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Supreme Court, U.S.
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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DANIEL G. GELLERT,

Petitioner,

v.

UNITED STATES DISTRICT COURT for the
SOUTHERN DISTRICT OF FLORIDA

PETITION FOR CERTIORARI

In pro se, by:

Daniel G. Gellert
P. O. Box 320370
Cocoa Beach,
Florida 32932
(407) 783-9412

44 pp

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QUESTIONS PRESENTED FOR REVIEW

Must a trial judge, while under criminal investigation by a Federal Grand Jury, disclose this fact to a plaintiff? Allow the plaintiff to file for recusal, and having failed to do so, is this a violation of plaintiff's due process rights under the **Fifth Amendment**?

Does a plaintiff have the same rights under Rule 56, to the entry of summary judgement motions as defendants have? To secure the just, speedy and inexpensive determination of his cause as a moving party, terminating the action in his favor? Is this guaranteed by the **Seventh Amendment**?

Can a union force the discharge of a minority employee under the forced collection of union dues, when membership was not available on the same terms as were applicable to others? When this non-member objected to his dues being used for political purposes, had an authorization for the voluntary deduction of his dues, paid the dues, and still he was discharged, is this a violation of his rights under the **First, Fifth and Fourteenth Amendments**?

Can "arbital immunity" be granted to union and employer officials under the Railway Labor Act and ERISA?

Is the forced collection of union dues a "minor dispute" under the Railway Labor Act, (2) 11, and therefore subject only to the exclusive remedy of arbitration, or are there Constitutional rights under the **First, Fifth and Fourteenth Amendments**, which are not "second bites at the apple", but provide federal court review and jurisdiction? Can arbitration resolve Petitioner's Constitutional rights in this cause, as courts below have ruled, or is this subject to review, and does a citizen have the right to petition the Supreme Court to hear his Constitutional grievance?

Just how far can the forced collection of union dues move against an employee? Does the **First, Fifth and Fourteenth Amendments** provide protection as to ERISA and Workers' Compensation Law benefits, or are these laws also part of the RLA (2)11 scheme to harm and punish an employee for the alleged failure to pay union dues?

LIST OF PARTIES

RESPONDENTS/DEFENDANTS in Court Case 90-1113-CIV-MOORE:

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS and employee benefit pension plan

EASTERN AIRLINES, INC., solely as Administrator of such defendant plan

PENSION BENEFIT GUARANTY CORPORATION

EASTERN AIRLINES RETIREMENT BOARD a/k/a PENSION DISPUTE BOARD

AIR LINE PILOTS ASSOCIATION

ALAN C. GIBSON

WILLIAM R. TEGTMAN

JACK N. MOGUS

CHARLES COPELAND

TRAVELERS INSURANCE CORPORATION

HONORABLE K. MICHAEL MOORE

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GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Plaintiff's due process rights have been violated by the courts below. Plaintiff has Constitutional protection under the Fifth Amendment to an unbiased court, a judiciary free from a taint of corruption, a District Court Judge who is free from the dark cloud of a criminal investigation.

Judge K. Michael Moore failed to inform plaintiff that he was under investigation for violations of felony criminal laws of the United States, accepting gratuities from individuals doing business with the U.S. Marshal Service under his direction, individuals who have been found guilty of bribery.

Judge Moore denied plaintiff's proper motions for summary judgements, which in this circumstance is a denial of due process, and violates plaintiff's Fifth and Seventh Amendment's Constitutional protection. This raises issues as to due process, plaintiff's rights to his summary judgements under the Seventh Amendment, in the orders of Judge Moore, who has accepted gratuities in violation of

federal ethical rules. See: Celotex Corporation v. Catrett, 477 U.S. 317; Matsushita Electrical Industrial Co. Ltd. v. Zenith Radio Corporation, 475 U.S. 574; Jack Anderson v. Liberty Lobby, Inc. 477 U.S. 242.

The Appeals Court has denied plaintiff a review of these Constitutional issues, which provides for jurisdiction herein.

The appeals court has found on November 20, 1992 that previous orders of the court below were not final, and these issues are properly before the district court for reconsideration and reversal. EXHIBIT A.

The district court in its Sept. 13, 1993 OMNIBUS ORDER ON PENDING MOTIONS, upheld the arbital immunity for the two Air Line Pilots officials, and further granted this immunity to the two employer officials. EXHIBIT B.

The court denied Petitioner's motions for summary judgement by stating: "Plaintiff's Motions for Summary Judgement based upon failure to respond to discovery or the Amended Complaints are Denied." Petitioner did not file a motion for summary judgement which was based upon defendant's failure to respond, and the Federal Rule of Civil Procedure 56, has no basis to consider defendants'

failure to respond to discovery or the complaint.

The court also filed an OMNIBUS ORDER on April 14, 1994, in this order the court has lumped Petitioner's other supporting motions in seeking his just due, the entry of his motion for summary judgement, and has made Petitioner's cause subject to dismissal as to any additional motions to support his proper motions for summary judgements. EXHIBIT C.

In Case No. 89 B 10448, U.S. Bankruptcy Court Southern District of New York, defendants successfully opposed Petitioner's recovery from the Eastern Airlines, Inc. estate, based upon unresolved summary issues, a magistrate's report, and a motion to strike.

The bankruptcy court hearing was on November 15, 1994, which has effectively denied Petitioner recovery, since the Petitioner's motions for summary judgements are continued to be denied by the district court.

Defendants argued to the bankruptcy court, which the court accepted, that petitioner's rights as to the forced collection of union dues was a "minor dispute" under the Railway Labor Act, and arbitration was Petitioner's exclu-

sive remedy, and a suit in a federal court was a "second bite at the apple", and the federal courts lacked jurisdiction.

This is in direct conflict with this court's previous opinions in IAM v Street, Communication Workers v. Beck, in which this Court established First, Fifth and Fourteenth Amendment rights, and in this case there is a Constitutional crisis, which is presented for certiorari and review.

This petition seeks to review the denial of a writ of mandamus by the United States Court of Appeals for the Eleventh Circuit, dated February 23, 1994. EXHIBIT D and denial of rehearsing dated, July 8, 1994. EXHIBIT E.

Petitioner was granted an extension of time to file the instant petition for certiorari, the October 5, 1994 order is attached as EXHIBIT G.

There are no issues as to statute of limitations, since the final administrative remedies were concluded during 1992 and 1994.

CONSTITUTIONAL AND STATUTORY PROVISIONS

FOR JURISDICTION

Petitioner's due process rights have unquestionably been denied by Judge K. Michael Moore's prior conduct at the U.S. Marshal Service, these actions which were based upon the acceptance of illegal gratuities, in violation of Federal Ethical Standards, raises serious and fatal concerns as to his denial of Petitioner's Constitutional rights to Summary Judgements under Rule 56, Federal Rules of Civil Procedures, and Local Rules 7.1 and 7.5, which state in part:

> **Rule 56. Summary Judgement (a) for Claimant.** A part seeking to recover upon a claim, . . . at any time after the expiration of 20 days from commencement of the action . . . **(c) Motions and Proceedings Thereon**. . . . The judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law. **(f) When Affidavits are Unavailable.** Should it appear from affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgement or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Local RULE 7.1.C. Memorandum of Law. Each party opposing a motion shall serve and file an opposing memorandum of law . . . Failure to do so may be deemed sufficient cause for granting the motion by default.

Local RULE 7.5 MOTIONS FOR SUMMARY JUDGE MENT. Motions for summary judgement shall be accompanied by a memorandum of law, necessary affidavits, and a concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried . . . All material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the opposing party's statement.

"The plaintiff in an action in Federal District Court cannot claim to have been 'railroaded' by a premature motion for summary judgement, where the motion is filed 12 months after the commencement of the action; any potential problem with a premature motion can be adequately dealt with under the Rule 56(f) of the Federal Rules of Civil Procedure, which allows a summary judgement motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery" Celotex Corp. v. Catrett, 477 U.S. 317, at 321, and at 320 this Court further stated "Federal Rules of Civil Procedure mandates the entry of

summary judgement, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, in such situation, there can be no genuine issue as to any material fact . . . the moving party is entitled to judgement as a matter of law".

While Celotex Supra, and other cases decided by this Court, were cases in which the moving parties were Defendants, Petitioner invokes the Seventh Amendment herein, and the same and exact standard should also apply to nonmoving defendants, and Petitioner's summary judgement should be granted.

Defendants needed sufficient showing of an essential element in their case, with respect to their burden of proof, to demonstrate the District Court, that their action in the discharge of the Petitioner did not violate the First, Fifth and Fourteenth Amendments of the Constitution .

Defendant Air Line Pilots Association, ("ALPA") had a duty to grant plaintiff's application for union membership, prior to a demand for the forced collection of union dues,

under the Railway Labor Act, ("RLA") 2(11), Union Security clause.

Defendants ALPA, as plaintiff's union, and sole bargaining representative, and Eastern Airlines, Inc., plaintiff's employer had a duty to honor plaintiff's voluntary authorization under the RLA's 2(11) (b), and deduct his union security obligation, since plaintiff had this authorization continuously on file from December 1971, to at least January, 1993.

Plaintiff did pay the union security payment requested, none-the-less defendants terminated his employment on June 17m 1986 for "failure to pay union dues".

Plaintiff is a minority under the law, and seeks the protection of the Constitutions First, Fifth and Fourteenth Amendments, see: International Association of Machinists v. S.B. Street, 367 U.S. 740; Communications Workers of America v. Harry E. Beck, 487 U.S. 735, since the termination of his employment was in clear and documented violation of these Constitutional provisions and safeguards.

Defendants' actions in further taking plaintiff's benefits under the independent statutes of ERISA and Workers'

Compensation Laws, solely in moving the harsh and punitive provisions of the RLA union Security, 45 U.S.C. 152 Eleventh, raises constitutional questions, if the First, Fifth and Fourteenth Amendments allow these new punitive provision to be so implemented.

Petitioner requested from the union, the cost of negotiating and administering the agreement, to protect his rights in free speech, and demanded union membership. These rights have been recognized by this Court: "Congress incorporated safeguards in the statute to protect dissenters' interest . . . to prevent discharge of employees for nonmembership where the union did not admit the employee to membership on racial grounds. International Machinist v. Street, 367 U.S. 740, at 758.

While this Court has recognized the Constitutional issues involving the forced collection of union dues, and has also provided for the judicially created duty of fair representation, ("DFR"), "A union's duty of fair representation is akin to the duty owed by other fiduciaries to their beneficiaries; see: Air Line Pilots Association v. O'Neill, 113 L.Ed

2d 51, at 54, which provides fertile judicial grounds for certiorari and a decision which resolves the Constitutional crisis herein.

Petitioner was discharged for the alleged failure to "pay union dues", when the applicable law and agreement required Petitioner to become a union member, which Petitioner did attempt to do, or if Petitioner did not attempt to become a union member to pay for the cost of negotiating and administering the agreement. In this case, defendants unlawfully used the narrow and constitutionally limited union dues issue to punish an employee, see: Gellert v. Eastern Air Lines, 370 So.2d 802, Eastern v. Gellert, 431 So.2d 329, and Eastern v. Gellert, 438 So.2d 923, and to unlawfully use the RLA union security for their purpose.

Defendants Defaulted Under Rule 56

The instant petition is based upon exceptional circumstances, in which Petitioner's summary judgements were denied by a judge under criminal investigation, and adequate relief cannot be obtained in any other form or from any other court, and the granting of certiorari, will be in aid of the Court's appellate jurisdiction.

Petitioner filed a motion for summary judgement against defendant Travelers Insurance Corporation, ("Travelers"), and the Pension Dispute Board, ("PDB"), on April 7, 1993.

Defendants Travelers and the PDB filed a "motion to strike" with out one scintilla of evidence under Rule 56 and completely disregarded the requirements of Rule 56 and Local Rules 7.1 and 7.5. Motions are not a proper and accepted method to respond to motions in general, but they are considered fatal to nonmoving parties in opposition to Rule 56 summary judgement motions.

In specific, motions "to strike" are proper only when used against pleadings, and are inappropriate and cannot be considered in a Rule 56 motion for summary judgement. Superior Beverage Co. v. State of Ohio, 324 F.Supp. 564

(N.D. Ohio 1971), Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880 (9th Cir. 1983), Hrubec v. National Railroad Passenger Corp., 829 F.Supp. 1502 (N.D. Ill. 1993), O'Connor v. State of Nevada, 507 F.Supp. 546 (D. Nev. 1981).

All other defendants also defaulted in meeting their specific burden under Rule 56 and Local Rules 7.1 and 7.5. Defendant Eastern Airlines, Inc., ("Eastern"), also filed a motion to strike, and defendants Air Line Pilots Association, ("ALPA"), and the Pension Benefit Guaranty Corporation, ("PBGC") filed unresponsive motions to stay and oppose. Defendants failed to file required and responsive memorandums of law, and all defendants therefore are in default, and Petitioner's proper motions for summary judgements should have been granted.

> "Summary judgement procedure is properly regarded not as disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action' . . . there can be no genuine issue as to any material fact', since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317 at 328 and 323.

Petitioner provided his voluntary authorization for the deduction of his union security obligations, as received from the files of defendant ALPA, and attached this with an affidavit to his motions for summary judgement.

Defendant's defense to this suit has been based solely upon Petitioner's discharge of his employment, and this discharge was for the alleged "failure to pay" his union security obligations, which triggers Petitioner's First, Fifth and Fourteenth Amendments rights, a burden which defendants had to overcome in their response to a Rule 56 summary judgement motion, to which all defendants defaulted.

STATEMENT OF THE CASE

Petitioner was a long term pilot employee of defendant Eastern Airlines, Inc., with an employment date of February 11, 1963, with the rank of Captain, and vested under the Employee retirement Income Security Act, ("ERISA"), and eligible for voluntary retirement on October 2, 1982.

Petitioner joined defendant Air Line Pilots Association, ("ALPA"), the exclusive bargaining representative of Eastern pilots, and assigned a voluntary deduction for his union security obligations under the Railway Labor Act, ("RLA"), 45 U.S.C. 152, Eleventh (b). during December 1971, and has not executed a revocation, and this authorization was continuously in effect at least until January 13, 1993, when a copy of this was furnished to Petitioner from defendant's ALPA/Herndon office by telephonic facsimile.

Petitioner was a plaintiff in a number of court cases against Eastern, as to Eastern's retaliation against Petitioner, as to his testimony involving an L-1011 airline crash in the Everglades near Miami in 1972, while Petitioner was not on board, his testimony resulted in a modification of the autopilot system.

Petitioner has been an outstanding Eastern pilot employee, and the controversy was not based on Petitioner's rights under the agreement, but were based on laws, regulation of the United States, as they applied to the safe operation of aircraft in air commerce, and coming under the Transportation Act.

Petitioner's First, Second and Third Amendment Complaints were dismissed sua sponte, and on motion, since these complaints named two high ranking officials of the union, and two high ranking officials of the employer as defendants.

These four defendants also represented the union and employer on the Pension Dispute Board, ("PDB") , this board is authorized to hear pension disputes, created under the provisions of ERISA, these members were fiduciary to Petitioner's pension claims.

The court granted these motion to dismiss with prejudice, based upon their position on this board, and assigned them "arbital immunity". Petitioner's suit documents that these defendants had an interest in the outcome of Petitioner's pension claim, two of the defendants were also

beneficiary of the same and exact defendant plan, and as union members used Petitioner's discharge for the alleged failure to pay union dues, to also deny his ERISA pension.

The other two defendants were high ranking officials of defendant Eastern, and defendant Al Gibson, first covertly approved Petitioner's discharge, then as a fiduciary, also denied Petitioner's vested ERISA pension benefit.

These defendants failed to call in a neutral, but ruled against Petitioner in a four-man board, and therefore there is no privilege, no arbital immunity. Intern. Union, United Auto. WKRS. v. Greyhound Lines, 701 F2d. 1181 (1983)

The appeals court ruled that the district court's order was not a final order, EXHIBIT A., but the district court has now granted arbital immunity to the other two defendants, and failed to grant reconsideration, and with out the intervention of this Court, Petitioner would be required to proceed in a new suit against these defendants. Omnibus Order On Pending Motions, dated September 13, 1993, EXHIBIT B., and Omnibus Order, dated April 14, 1994. EXHIBIT C.

Petitioner has been provided prima facie evidence, which all came from defendants, Treasurer Report of defendant ALPA, which records over 34 million dollars spent for political, organization expenses to which Petitioner objected. ALPA informed Petitioner: "Under Document 102 the costs of the arbitration are your responsibility since you filed an appeal in this matter.", while the defendants and the so called neutral arranged otherwise, which documents fraud, and raises issues as to bribery of a public official, and raises issues if petitioner had a fair and impartial hearing in this particular arbitration.

Petitioner has provided sufficient prima facie evidence to invoke the jurisdiction of this Court on certiorari, as to denial of due process, both in arbitration and the district court below, defendants' clandestine payment of money to an arbitrator, discharge of employment and denial of ERISA benefits by a fiduciary, and criminal investigation of the trial judge.

ARGUMENT

The granting of this petition for certiorari will greatly aid the Court's appellate jurisdiction, as the exceptional circumstances in this cause bring considerations of Constitutional questions under the First, Fifth, Seventh and Fourteenth Amendments, and adequate relief cannot be obtained in any other form and from any other court.

The United States Court of Appeals, Eleventh Circuit, has sanctioned and departed from accepted and usual course of judicial proceedings, in denying a writ of mandamus to examine Petitioner's due process rights under the Fifth Amendment.

The Constitution guarantees judicial integrity, free from a taint of criminal wrong doing, and protects citizens in their pursuit of justice. Petitioner could not receive a fair and impartial hearing in the district court while the judge was under criminal investigation. The allegations of criminal wrong doing was based upon bribery, and violations of federal ethical standards in the acceptance of gratuities.

Petitioner has protection under the Fifth Amendment's

due process clause, since the judge below has used the awesome power of the district court to deny Petitioner's rights to summary judgements under Rule 56 Fed.R.Civ.P., raising a clear violation of Petitioner's Seventh Amendment rights to a speedy, and inexpensive resolution of the instant action, a right which has been recognized by this Court in many prior cases.

Petitioner has met all procedural requirements for the entry of his motions for summary judgements, nor have defendants raised, or the court below found any procedural defects, and this Court has found that a period of one year, prevents the nonmoving party from claims of being railroaded, and Rule 56(f), also provides relief if further discovery should be required, and therefore petitioner's motions should have been granted under Celotex Supra, Anderson Supra, and Matsushita Supra.

Petitioner has also met the governing substantive law requirements, as this Court has established Constitutional rights under the First, Fifth and Fourteenth Amendments under the forced collection of union dues, IAM v. Street Supra.

Petitioner's material facts have established that there are no genuine issues between the parties, defendants have no admissible evidence upon which a jury could rule in their behalf, and Petitioner's summary judgement should have been granted as a matter of law.

Petitioner provided evidence from defendants' own files, ONE, that Petitioner applied for union membership, and while this application was pending, defendant ALPA requested his discharge for the non-payment of union dues. TWO, defendants had in their files, voluntary union dues deduction authorizations, current and in effect from December, 1971 at least until January 13, 1993.

THREE, Petitioner objected under the Constitution to the use of his money for political purposes, and as a non-member objected to the payment of money beyond the cost of negotiating and administering the contract.

FOUR, Petitioner did pay the money demanded by defendant ALPA, including those earmarked for that union's political purposes.

FIVE, Defendants also included Petitioner's independent rights under the Employee Retirement Income Security

Act, and Worker Compensation Laws in the harsh and punitive provisions of the forced collection of union dues, and have used an unlawful discharge under the forced collection of union dues, to also include the loss of benefits under these statutes.

SIX, Defendant ALPA, as the sole bargaining agent representing Petitioner, has denied its duty of fair representation, and has joined the other defendants to unlawfully discharge Petitioner's employment, for reasons other than those recognized under the provisions of the RLA's (2)11th, Union Security.

WHEREAS, the Supreme Court has recognized Petitioner's Constitutional rights under the First, Fifth and Fourteenth Amendments of the Constitution, under the provisions of the Railway Labor Act's (2)11th, forced collection of union dues. This Court has not ruled on an actual discharge of a minority employee, who was denied union membership, and as a non-member objected to the use of his dues for political purposes, and had voluntary authorization for the deduction of his dues, and finally paid the money demanded, including those for political purposes, in

clear violation of the Constitution.

Based upon the foregoing facts, this Petition for Writ of Certiorari should be granted. The Supreme Court should resolve these Constitutional questions, and grant the relive requested, since adequate relief cannot be obtained in any other form or from any other court.

These extraordinary circumstances provide for granting certiorari, and the resolution of Petitioner's rights under the Constitution.

Respectfully submitted,

/s/_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been served this _____ day of _____, 199___, by U.S. Mail to:

Mr. Drew S. Days III
Solicitor General
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Washington, D.C. 20530

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U.S. Court of Appeals for
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Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 92-4091

DANIEL G. GELLERT,
Plaintiff-Appellant,

versus

EASTERN AIR LINES FIXED BENEFIT
RETIREMENT INCOME PLAN FOR PILOTS,
an employee benefit pension plan,
EASTERN AIRLINES, INC., solely as
Administrator of such defendant,
WILLIAM R. TEGTMAN, NOEL HONOHAN,
CHARLES COPELAND, JACK N. MOGUS,
ALAN G. GIBSON and PENSION BENEFIT
GUARANTY CORPORATION,
Defendants-Alleppees,
EASTERN AIRLINES PILOTS RETIREMENT BOARD,
ETC.,
Defendants.

Appeal from the United States District Court for the
Southern District of Florida

Filed November 20, 1992

Before FAY, DUBINA, and BLACK, Circuit Judges.

BY THE COURT:

The appellees' motions to dismiss the appeal are GRANTED. The district court's orders granting the motion to dismiss of appellees Mogus and Copeland and directing the entry of a final judgement in their favor are not final and appealable because the district court did not make the express determination that there was no just reason for delay in the entry of judgement as required by Fed.R.Civ.P. 54(b). 28 U.S.C. Par. 1291; see Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1368-69 (11th Cir.) **cert. denied**, 464 U.S. 893 (1983). That is especially true in this case since appellant has filed amended complaints, which are presently pending in the district court, attempting to reassert claims against Mogus and Copeland. Accordingly, this appeal is DISMISSED for lack of jurisdiction

EXHIBIT A

Excerpts from: UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-1113-CIV-MOORE

DANIEL G. GELLERT,
Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT
RETIREMENT INCOME PLAN FOR PILOTS
et. al.,
Defendant

Filed Sept. 13, 1993

OMNIBUS ORDER ON PENDING MOTIONS

I. MOTION TO DISMISS

Defendants William Tegtman and Alan Gibson sought dismissal of Plaintiff's action against them because of their status as members of the Railway Labor Act ("RLA") dispute board. Judge Federico A. Moreno previously dismissed Plaintiff's action, with prejudice, against several members of the RLA dispute board, i.e. Jack Mogus and Charles Copeland because of that same status. See Order of Judge Moreno, entered September 4, 1991 (citations omitted). Plaintiff alleges that Gibson and Tegtman were members of the RLA dispute board.

See Fourth Amended Complaint at Par. 15 and 16, respectively. Accordingly, Defendants Tegtman and Gibson are dismissed from this action with prejudice consistent with the law of this case. Defendant's Motion to Dismiss (DE #123) is GRANTED.

V. MOTIONS FOR SUMMARY JUDGEMENT

Plaintiff filed numerous motions for summary judgement during the pendence of the motions to strike the Third and Fourth Amended Complaints. Accordingly, Plaintiff's Motions for Summary Judgement based upon failure to respond to discovery or the Amended Complaints are DENIED.

DONE AND ORDERED in chambers at the United States Courthouse, Federal Courthouse Square, Miami, Florida this 10th day of September, 1993.

/s/_____
K. MICHAEL MOORE
UNITED STATES DISTRICT COURT JUDGE

cc:
Daniel Gellert, pro se
Counsel of Record

EXHIBIT B

Excerpt from:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 90-1113-CIV-MOORE

DANIEL G. GELLERT,
Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT
RETIREMENT INCOME PLAN FOR PILOTS et.
al.,
Defendants

Filed on April 14, 1994

OMNIBUS ORDER

The Court places the Plaintiff on notice that if he files additional summary judgement motions without leave he will be subject to sanctions, including the dismissal of his complaint.

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motions for Summary Judgement (DE #230); (DE #240); (DE#244); and (DE#252) is hereby DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 15th day of April, 1994.

/s/_____
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

copies provided:
Counsel of Record

EXHIBIT C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 93-4928

IN RE:

DANIEL G. GELLERT,

Petitioner.

Filed Feb. 23, 1994

On Petition for Writ of Mandamus to the
United States District Court for the
Southern District of Florida

Before: ANDERSON, COX and BLACK, Circuit Judges.

BY THE COURT:

Petitioner's application for a writ of mandamus is DENIED because petitioner has an adequate remedy by appeal.

EXHIBIT D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-4928

Filed July 8, 1994

IN RE:

DANIEL G. GELLERT,
Petitioner

On Petition for Writ of Mandamus to the
United States District Court for the
Southern District of Florida

BEFORE: ANDERSON, COX and BLACK, Circuit Judges.

BY THE COURT:

Petitioner's "Suggestion of Rehearing In BANC," treated as a motion for reconsideration of this Court's order dated February 23, 1994, denying his petition for writ of mandamus, is DENIED.

EXHIBIT E.

Eleventh Union security agreement; check-off

Notwithstanding any other provision of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted --

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class; Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or termi-

ployee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership

(b) to make agreements providing for the deductions by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

EXHIBIT F.

Supreme Court of the United States

No. A-264

Daniel G. Gellert
Petitioner

v

United States District Court for the
Southern District of Florida

ORDER

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including December 5, 1994.

/s/_____
Anthony M. Kennedy
Associate Justice of the Supreme
Court of the United States

Dated this 17th
day of October, 1994.

EXHIBIT G

Supreme Court, U.S.
FILED
JAN 26 1995
OFFICE OF THE CLERK

(2)

No. 94-1015

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DANIEL G. GELLERT,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA,

Respondent.

On Petiton for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION

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12 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should exercise certiorari jurisdiction to review the Eleventh Circuit Court of Appeals' denial of Petitioner's petition for writ of mandamus seeking review of the District Court's denial of a motion for summary judgment in a case that is still pending.

2. Whether this Court should exercise certiorari jurisdiction to review the Eleventh Circuit Court of Appeals' November 1992, Order dismissing Petitioner's untimely appeal of an uncertified, non-final order.

LIST OF PARTIES

Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots

Eastern Airlines, Inc., as administrator of the Plan

Pension Benefit Guaranty Corporation

Eastern Airlines Retirement Board a/k/a Pension Dispute Board

Air Line Pilots Association, International

Travelers Insurance Corporation

Alan C. Gibson*

William R. Tegtman*

Jack N. Mogus*

Charles Copeland*

Honorable K. Michael Moore

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* Individual members of the Pension Dispute Board who have been dismissed with prejudice from the underlying action.

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CASE NO. 94-1015
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

DANIEL G. GELLERT,

Petitioner,

v.

UNITED STATES DISTRICT COURT
for the SOUTHERN DISTRICT OF
FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

CITATION OF OPINIONS AND JUDGMENTS BELOW

1. Gellert v. Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots, U.S.C.A. 11th Circuit, Case No. 92-4091, Order of Dismissal, filed November 20, 1992.

2. In re Daniel G. Gellert, U.S.C.A. 11th Circuit, Case No. 93-4928, Denial of Application for Writ of Mandamus, filed February 23, 1994.

3. In re Daniel G. Gellert, U.S.C.A. 11th Circuit, Case No. 93-4928, Denial of "Petitioner's Suggestion of Rehearing In BANC," filed July 8, 1994.

Theses orders are attached to the Petition as Exhibits A, D, and E, respectively.

STATUTES OR OTHER PROVISIONS INVOLVED

28 U.S.C. § 1254(1)

28 U.S.C. § 1651(a)

Supreme Court Rules 10 and 13

STATEMENT OF THE CASE

Petitioner brought a two count complaint in the United States District Court for the Southern District of Florida. Count I of the Amended Complaint sought to overturn the decision of the Eastern Airlines Pilots Retirement Board a/k/a Pension Dispute Board ("PDB"), which denied Petitioner's claim for a disability retirement pension. Petitioner sued both the PBD and the individual members of the PDB, including Charles Copeland and Jack Mogus, the PDB members appointed by the Air Line Pilots Association, International ("ALPA"). Petitioner's claim allegedly arose under the Employee Retirement Income Security Act of 1974 ("ERISA"). Count II alleged failure to disclose certain information relating to the retirement plan required by ERISA.

On January 10, 1992, the district court dismissed Count I of the Amended Complaint with prejudice. On January 10, 1992, the court also dismissed Copeland and Mogus as defendants with prejudice on immunity grounds. Count II remained pending.

Petitioner appealed the order of dismissal to the United States Court of Appeal, Eleventh Circuit, Case No. 92-4091. On November 20, 1992, the Court of Appeals dismissed Petitioner's appeal because the order of dismissal was not a final order and because the district court did not make the express determination that there was no just reason for delay in the entry of judgment, as required by Rule 54(b) of the Federal Rules of Civil Procedure. Petitioner then proceeded to file successive amended complaints in the district court, greatly expanding the scope of his lawsuit and

adding new parties, including ALPA. Defendants in the district court (Respondents herein) moved to strike the various complaints. While such motions to strike were pending and before the district court had granted leave to amend the complaints, Petitioner filed numerous motions for summary judgment. In its Omnibus Order on Pending Motions, filed September 13, 1993, the district court ordered stricken all of Petitioner's complaints, save his Fourth Amended Complaint, and denied Petitioner's various motions for summary judgment. The district court's order permitted Petitioner to file appropriate substantive motions for summary judgment after the completion of discovery and with leave of court. After entry of the September 13, 1993, Omnibus Order, but prior to the completion of discovery and without leave of court, Petitioner filed additional motions for summary judgment. In its Omnibus Order, filed April 14, 1994, the district court denied Petitioner's additional motions for summary judgment for failure to comply with its previous order. The matter is still pending before the district court, the defendants below having responded to Petitioner's Fourth Amended Complaint and filed several dispositive motions.

Petitioner filed an Application and Petition for Writ of Mandamus with the Eleventh Circuit Court of Appeals, Case No. 93-4928. Petitioner sought to have summary judgment entered in his favor. In an Order filed February 23, 1994, the Court of Appeals denied Petitioner's application for writ of mandamus because Petitioner will have an adequate remedy by appeal upon completion of the case. Petitioner thereafter filed a "Suggestion of Rehearing In Banc," asserting that the district court judge denied

Petitioner a "fair and impartial resolution of this otherwise good cause of action" and, without further elaboration, also asserted that the defendants below are "taking unlawful advantage of the district court's personal criminal legal problems."[1/] In an Order filed July 8, 1994, the Court of Appeals denied Petitioner's "Suggestion of Rehearing In Banc," which the Court of Appeals treated as a motion for reconsideration. The instant petition followed.

ARGUMENT

(i) Denial Of Writ Of Mandamus In Case No. 93-4928

Rule 10 of the Supreme Court Rules provides that a petition for writ of certiorari will be granted only when there are special and important reasons therefor. This case presents neither special nor important circumstances, and the factors set forth in Rule 10 are wholly absent.

As set forth above, this matter is still pending before the district court and no legal issues are raised that cannot

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[1/]Despite Petitioner's scandolous accusations against the district court judge, Petitioner has failed to file a motion to recuse the judge, precluding the instant allegations. Further, any such motion would undoubtedly be improper, given Petitioner's, unsupported, irrational, and tenuous claims. See Giles v. Garwood, 853 F.2d 876 (11th Cir.), cert. denied, 489 U.S. 1030 (1989). In any event, the investigation of alleged wrongdoings by the district court judge was closed without any finding of wrongdoing.

wait for review on appeal. See Pacific Union Conference of Seventh-Day Adventists v. Marshall, 434 U.S. 1305 (1977).

The Eleventh Circuit's denial of Petitioner's application for a writ of mandamus because Petitioner has an adequate remedy by appeal (Exhibit D to Petitioner's Petition For Certiorari) is wholly consistent with other decisions of this Court as well. In Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953), this Court concluded that the supplementary review power conferred by the All Writs Act (28 U.S.C. § 1651(a)) is meant to be used in the exceptional case where there is clear abuse of discretion or usurpation of judicial power. The Court further stated that extraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial. Id. at 383. Yet, this is exactly what Petitioner seeks -- to circumvent the appeals process to review the district court's non-final orders denying summary judgment. The Eleventh Circuit recognized that Petitioner has an adequate remedy by appeal and properly denied the application for a writ of mandamus. See Plekowski v. Ralston-Purina Co., 557 F.2d 1218 (5th Cir. 1977). There thus is no basis for granting of certiorari, and doing so would circumvent the appellate process established by Congress and this Court.

(ii) The Eleventh Circuit's Dismissal Of Appeal No. 92-4091

The petition with respect to the Eleventh Circuit's dismissal of Appeal No. 92-4091, challenging the district court's dismissal of Count I of the Amended Complaint and Mogus and Copeland, is untimely. The Court of Appeals filed its Order of Dismissal on November 20, 1992, well

outside Supreme Court Rule 13's ninety-day limitations period.

CONCLUSION

The Court should deny the Petition because it seeks review of non-final orders, totally circumventing the appellate process, and because Petitioner seeks certiorari jurisdiction to challenge a Court of Appeals order filed in November 1992, well outside the ninety-day time frame for petitions for writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 27 1995
OFFICE OF THE CLERK

(3)

NO. 94-1015

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

DANIEL G. GELLERT,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED[1]

Whether the Eleventh Circuit Court of Appeals properly denied a petition for writ of mandamus and properly refused to compel the district court to rule on motions for summary judgment where the district court denied the motions for summary judgment after the petition was filed.

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[1] Although Petitioner Daniel G. Gellert ("Gellert") raises six "Questions Presented" in his petition, the questions that Gellert presents have not been resolved in the lower courts and have not been properly preserved for certiorari review in this Court as will be discussed in the argument portion of this response.

LIST OF PARTIES[2]

Air Line Pilots Association
Charles Copeland
Eastern Airlines, Inc.
Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots
Eastern Airlines Retirement Board a/k/a Pension Dispute Board
Daniel G. Gellert
Alan C. Gibson
Jack N. Mogus
The Honorable K. Michael Moore
Pension Benefit Guaranty Corporation
William R. Tegtman
Travelers Insurance Company

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[2] All of the parties listed, other than Gellert, the plaintiff below, and the Honorable K. Michael Moore, the district court judge, were named as defendants in Gellert's third amended complaint, which was the operative complaint at the time Gellert filed the petition for writ of mandamus. The third amended complaint has since been stricken and individual defendants Charles Copeland, Alan C. Gibson, Jack N. Mogus, and William R. Tegtman have been dismissed from the underlying action.

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LOWER COURT ORDERS AND JUDGMENTS

United States District Court, Southern District of Florida
Omnibus order on pending motions
(Appendix 10)

United States Court of Appeals, Eleventh Circuit
Order denying petition for writ of mandamus
(Appendix 11)

United States Court of Appeals, Eleventh Circuit
Correspondence that the order denying the petition for writ of mandamus is issued in lieu of a mandate
(Appendix 12)

United States Court of Appeals, Eleventh Circuit
Order denying motion for reconsideration
(Appendix 13)

STATEMENT OF JURISDICTION[3]

The order from the Eleventh Circuit Court of Appeals upon which review is sought denies a petition for writ of mandamus because the petitioner has an adequate remedy by appeal.[4] This Court does not have jurisdiction to review the order because the petition for writ of certiorari was untimely filed. Even if the petition had been timely filed, this Court

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[3] Gellert does not set forth the grounds for invoking this Court's jurisdiction in his petition, but instead he improperly uses this section to argue issues that have yet to be resolved in the lower courts and to inject other unrelated court proceedings before this Court.

[4] Gellert's appendix contains three other lower court orders. Two of these orders were entered by the district court after Gellert filed his petition for writ of mandamus in the Eleventh Circuit Court of Appeals. The other order dismisses an appeal for lack of jurisdiction because the order appealed was non-final and nonappealable. Gellert apparently appended these orders to his petition for writ of certiorari to provide this Court with background information. Certiorari review of these orders is improper because (1) Gellert's petition seeking review of all three orders is untimely; and (2) this Court does not have certiorari jurisdiction to grant direct review of district court orders.

has no jurisdiction pursuant to 28 U.S.C. § 1254 and Supreme Court Rule 10.1 because the issue to be reviewed is now moot and an adequate remedy by appeal is available after final judgment.

STATEMENT OF THE CASE

This action originated in the District Court of the Southern District of Florida ("district court") when petitioner Daniel G. Gellert ("Gellert"), plaintiff below, filed a two-count complaint on May 9, 1990, against various defendants [not including Travelers Insurance Company ("Travelers")] to recover retirement and pension benefits allegedly owing to him. (App. 1). Thereafter, the district court dismissed count I[5] of Gellert's amended complaint with prejudice because it was time barred and granted individual defendants

[5] This count sought to vacate a decision of the Eastern Airlines Retirement Board a/k/a Pension Dispute Board, which found Gellert ineligible for disability retirement benefits.

Mogus' and Copeland's motions to dismiss. (App. 2).

Gellert, acting pro se, then filed a ten-count first amended complaint against numerous defendants [Travelers was named as a defendant but was never served or notified of this action] on January 30, 1992, alleging claims under RICO, 18 U.S.C. §1961 et seq.; ERISA, 29 U.S.C. § 1132 et seq.; 42 U.S.C. § 1983; statutory and common law of Florida, and under the laws of the Workers' Compensation Board. (App. 3). The district court struck plaintiff's first amended complaint sua sponte because it "included Counts and named Defendants which were previously dismissed." (App. 4). The district court granted Gellert leave to amend the complaint and ordered that the amended complaint "SHALL NOT include reference to any Counts or any Defendants previously dismissed" (emphasis in the original).

Contrary to the express terms of the district court's order, Gellert then filed a third amended complaint against

various defendants [Travelers was served for the first time] alleging virtually the same causes of action contained in the first amended complaint that was struck. (App. 5). The third amended complaint also named defendants that the district court had previously dismissed from the action.

On May 28, 1992, Travelers moved to strike or dismiss Gellert's third amended complaint on grounds that the complaint was in violation of the district court's previous order or that it was impermissibly vague and ambiguous. (App. 6). Notwithstanding Travelers' pending motion to strike or dismiss the third amended complaint, Gellert moved for summary judgment based on the third amended complaint. (App. 7). Travelers responded by moving to strike or stay Gellert's motion for summary judgment pending resolution of its outstanding motion to strike or dismiss the third amended complaint. (App. 8).

Before the district court ruled on either Travelers'

motion to strike or dismiss the third amended complaint or Gellert's motion for summary judgment, Gellert filed a petition for writ of mandamus in the Court of Appeals for the Eleventh Circuit ("court of appeals"). (App. 9). Gellert sought issuance of a writ of mandamus solely to compel the district court to rule on his motions for summary judgment because the district court had allegedly failed to set a hearing or dispose of his motions in a timely manner in accordance with its local rules.[6] Gellert also asserted that he was entitled to summary judgment because the defendants, including Travelers, had allegedly defaulted in failing to properly respond to his summary judgment motions and, therefore, no genuine issue of material fact existed. Gellert's petition completely ignored that under Federal Rule of Civil Proce-

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[6] Gellert, however, did not file any motion in the district court to compel it to rule on his motion for summary judgment after the clerk of the district court issued a "Notification of 90 days expiring and ripeness for hearing" on Gellert's motion for summary judgment.

dure 12 Travelers was not required to respond to his third amended complaint, much less his summary judgment motion based thereon, until after the district court ruled on Travelers' pending motion to strike or dismiss the third amended complaint.

After Gellert filed his petition for writ of mandamus but before the court of appeals ruled on it, the district court struck the third amended complaint and denied Gellert's motions for summary judgment based on the third amended complaint. (App. 10). The district court further ordered that Gellert "may file appropriate substantive motions for summary judgment in accordance with Rule 56 of the Federal Rules of Civil Procedure after completion of discovery and only upon leave of Court." Subsequently, the court of appeals denied Gellert's petition for writ of mandamus because "petitioner has an adequate remedy by appeal." (App. 11). Gellert filed the instant petition for writ of certiorari.

SUMMARY OF ARGUMENT

The instant petition should be denied because it is untimely, the issue sought to be reviewed has been rendered moot, and an adequate remedy by appeal is available after final judgment.

Dismissal of the petition is warranted because it is untimely. Gellert had 90 days from the date of the order denying his petition for writ of mandamus within which to petition for certiorari review or file for an extension of time, because the mandate issued immediately. Gellert's motion for reconsideration filed after the mandate issued was a legal nullity and did not stay the time period for filing a petition for writ of certiorari. Consequently, Gellert's petition for writ of certiorari filed more than nine months after the order denying his petition for writ of mandamus is untimely and requires dismissal.

Additionally, the relief that Gellert requested on

mandamus in the court of appeals was obtained and therefore renders moot any consideration of the merits of his petition. Gellert sought to compel the district court to rule on his motions for summary judgment against all of the defendants, including Travelers. Shortly after he filed his petition for writ of mandamus, however, the district court entered an omnibus order that, inter alia, denied Gellert's motions for summary judgment. As a result, Gellert obtained the relief that he requested on mandamus and the propriety of the court of appeals' denial of mandamus is now moot.

The petition should also be denied because the court of appeals correctly found that Gellert has an adequate remedy by appeal after final judgment is rendered. Moreover, Gellert's petition seeks this Court's review of issues that have not been resolved in the lower courts and that were not before the court of appeals in the underlying petition for writ of mandamus. After a final judgment is rendered, Gellert

has an adequate remedy by appeal to review the propriety of the district court's order denying his motions for summary judgment as well as the issues he has improperly brought before this Court at this time. The petition accordingly should be denied. The petition furthermore should be denied on the additional ground that it fails to comply with this Court's rules governing preparation of petitions.

ARGUMENT

Gellert seeks a writ of certiorari from an order of the court of appeals denying his petition for writ of mandamus to compel the district court to consider and decide his motions for summary judgment. This Court should deny Gellert's petition for writ of certiorari because it is untimely, the issue to be reviewed is now moot, Gellert has an adequate remedy by appeal after final judgment is rendered in the district court and the petition violates the rules for preparing petitions.

A. Dismissal is warranted since the petition was untimely filed

A petition for writ of certiorari must be dismissed if it is untimely filed. As this Court has held:

> Title 28 U.S.C. § 2101 ... requires that a petition for certiorari in a civil case be filed within 90 days of the entry of judgment below. This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits. Unless the [] petition was filed within 90 days of the entry of the Court of Appeals' judgment, we must dismiss the petition.

Missouri v. Jenkins, 495 U.S. 33, 45 (1990). The time for filing a petition for writ of certiorari may be tolled only where the mandate is stayed by the court of appeals or where the mandate is stayed by a timely filed petition for rehearing in the court of appeals. Fed. R. App. P. 41. The court of appeals may shorten both the time for issuing its mandate and the time for filing rehearing petitions. Fed. R. App. P. 40(a); 41(a); *Johnson v. Bechtel Assoc. Prof. Corp.*, 801 F.

2d 412, 415 (D.C. Cir. 1986). Furthermore, the mandate issues when the court releases a certified copy of its order or judgment. Fed. R. App. P. 41(a) ("A certified copy of the judgment any a copy of the opinion of the court, if any, ... shall constitute the mandate, unless the court directs that a formal mandate issue"); *see Johnson*, *supra* (certified copy of the judgment constituted the mandate of the court of appeals, and, therefore, the date that certified copy of the judgment was transmitted to the district court was the date that the mandate issued); *United States v. Gardner*, 464 F. 2d 614, 615 (9th Cir. 1972) (certified copies of the court of appeals' judgment constituted the mandate).

On February 23, 1994, the court of appeals entered an order denying Gellert's petition for writ of mandamus "because petitioner has an adequate remedy by appeal". (App. 11). In correspondence dated the same day, the court of appeals sent Gellert a certified copy of its order and in-

formed him that its order denying his petition for writ of mandamus was issued in lieu of a formal mandate. (App. 12). Thus, the order of February 23, 1994 constitutes the court of appeals' mandate and plainly eliminated Gellert's time for filing a petition for rehearing. Fed. R. App. P. 41(a); *Johnson*, *supra*; *Gardner*, *supra*.

Once the mandate issues, a petition for rehearing is unauthorized and cannot be filed to stay the mandate since the mandate has already issued. *See Johnson*, *supra* (issuance of mandate in court of appeals necessarily eliminates time for filing petition for rehearing); *United States v. DiLapi*, 651 F. 2d 140, 144 (2d Cir. 1981) (filing of petition for rehearing in court of appeals after mandate issues does not revest jurisdiction in that court), *cert. denied*, 455 U.S. 938 (1982); *see also Dye v. Kansas State Supreme Court*, 803 F. Supp. 1379, 1383 (D. Kan. 1993) ("usually, the issuance of the mandate means the end of litigation" in the

court issuing the mandate). Therefore, Gellert's petition for rehearing was unauthorized and did not stay the mandate or toll the time for seeking certiorari review.

Consequently, Gellert had 90 days from February 23, 1994 within which to file a petition for writ of certiorari or seek an extension of time for filing the petition. 28 U.S.C. § 2102(c); Sup. Ct. R. 13.1, 30.2. Gellert did not seek an extension of time for filing his petition in this Court until October 3, 1994, which was 222 days after the February 23, 1994 order was entered. Because Gellert failed to timely file his petition for writ of certiorari, this Court should dismiss the petition.

B. The petition should be dismissed because the question presented is moot

Apart from the untimely filing of Gellert's petition for writ of certiorari in this Court, the question presented for review -- whether the court of appeals properly refused to compel the district court to rule on motions for summary

judgment -- is now moot. While the petition for writ of mandamus was pending in the court of appeals, the district court entered an omnibus order that, inter alia, denied Gellert's motions for summary judgment based on the third amended complaint and struck the third amended complaint. (App. 10). Because the district court has ruled on Gellert's motions for summary judgment, which was the sole relief that Gellert sought on mandamus, the question presented is now moot. *Cf. Williams v. Simons*, 355 U.S. 49 (1957) (petition for writ of mandamus or prohibition to compel a district court to decide a motion for a temporary injunction and a motion to dismiss was rendered moot since the district court dismissed the complaint after the petition was filed and thereby precluded consideration of the merits of the issues presented); *Penn-Central Merger & N & W Inclusion Cases*, 389 U.S. 486 (1968) (petition for writ of mandamus or certiorari challenging a district court order staying certain

proceedings was rendered moot when the district court dissolved the stay order). The petition for writ of certiorari accordingly should be dismissed.

C. An adequate remedy is available by appeal after final judgment is rendered

The court of appeals properly denied Gellert's mandamus petition because he has an adequate remedy to review the district court's rulings by appeal from any final judgment ultimately entered in the case. It is well settled that mandamus may not be used as a mere substitute for appeal. *Kerr v. United States District Court*, 426 U.S. 394 (1976). Moreover, mandamus is inappropriate to review an order on a parties' motion for summary judgment. *Communications Workers of America v. American Tel. & Tel. Co.*, 932 F. 2d 199, 210 (3d Cir. 1991). Rather, an adequate and proper remedy to review an order granting or denying summary judgment is by appeal after entry of a final judgment. *Abbs v. Sullivan*, 963 F. 2d 918, 923 (7th Cir. 1992); *Wright v.*

South Ark. Regional Health Cent., Inc., 800 F. 2d 199, 202 (8th Cir. 1986). Therefore, the court of appeals' denial of the petition on the ground that Gellert had an adequate remedy on final appeal is amply supported by law.

The court of appeals' denial of the petition for writ of mandamus was correct on the merits as well. Gellert premised his petition for writ of mandamus on the district court's alleged failure to set a hearing or rule on his motions for summary judgment within ten days of the clerk's notice of ripeness for hearing pursuant to the district court's local rule 7.1(B). Gellert further asserted that he was entitled to summary judgment under the district court's local rule 7.1(C), which provides that a party's failure to serve and file an opposing memorandum within the time prescribed "may be deemed sufficient cause for granting the motion by default." Gellert contended that the defendants, including Travelers, had allegedly failed to properly respond to his

summary judgment motions, and, therefore, they were in default and he was entitled to summary judgment as a matter of law.

However, before Gellert had moved for summary judgment based on the third amended complaint, Travelers, as well as the other defendants, had moved to strike or dismiss that complaint because it violated a district court order by alleging previously dismissed counts and naming previously dismissed defendants. Therefore, the district court had not yet determined the viability of the third amended complaint when Gellert claimed that he was entitled to judgment based thereon. Travelers' motion to strike or dismiss the third amended complaint suspended the time for serving an answer until disposition of Travelers' motion. Fed. R. Civ. P. 12. It follows that since Travelers did not have to answer the third amended complaint, Travelers did not have to respond to Gellert's motion for summary judgment thereun-

der until and unless the complaint was deemed sufficient. *See Bagwell v. Brannum*, 533 F. Supp. 362, 363 (N.D. Ga. 1982) (court must pass on dispositive motion to remand prior to reaching motion for summary judgment).

In an abundance of caution, however, Travelers moved to strike or stay Gellert's motion for summary judgment until its motion to strike or dismiss the third amended complaint was resolved. No default therefore could be entered against Travelers.

It is plain from the foregoing, that a ruling by the district court on Gellert's motions for summary judgment was premature. Therefore, the court of appeals properly denied the petition for writ of mandamus to compel such ruling.[7]

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[7] Even assuming arguendo that Travelers defaulted, which is denied under this record, the district court properly declined to enter a default in its discretion. Gellert has failed to show that the court of appeals' should have compelled the district court to rule differently than it did on the

Gellert furthermore misapprehends the scope of this Court's certiorari review and raises six "Questions Presented" in his petition, none of which are ripe for appellate review or properly before this Court. Gellert's petition for writ of certiorari is grounded on the court of appeals' denial of mandamus to compel the district court to rule on his motions for summary judgment under the third amended complaint. However, in his petition for writ of certiorari, Gellert goes beyond seeking review of the court of appeals' denial of mandamus and requests this Court to decide the merits of the now operative fourth amended complaint pending in the district court, which the district court has not yet ruled upon, and to reverse a district court order dismissing certain individual defendants, which the court of appeals has

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motions for summary judgment. *See Zerilli v. Thornton*, 428 F. 2d 476, 477 (6th Cir. 1970) ("mandamus cannot be used to compel a judge to decide a case a particular way").

not passed upon either.[8]

Gellert cannot circumvent the proper procedure for having his causes of action against the defendants decided in the lower courts. Rather, this action must be resolved in the district court and then reviewed on appeal in the court of appeals before Gellert can attempt to invoke this Court's jurisdiction. Certiorari relief is premature because Gellert has an adequate remedy by appeal after a final judgment is rendered. Gellert fails to assert any basis for invoking this Court's certiorari jurisdiction.

This Court has steadfastly adhered to a longstanding rule that precludes granting certiorari where the questions

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[8] For example, Gellert seeks to have this Court review a previous order of the district court granting arbitral immunity to individual defendants Copeland and Mogus dismissing these defendants in the case below. In addition, Gellert seeks review of his pending claims, as well as for claims that have been previously arbitrated, involving disputes over the denial of his pension benefits and his termination from employment at Eastern based on the nonpayment of union dues.

presented have not been pressed or passed upon below. *E.g. United States v. Williams*, 112 S.Ct. 1725, 118 L.Ed.2d 352, 361 (1992); *Taylor v. Freeland & Kronz*, 112 S.Ct. 1644, 118 L.Ed.2d 280, 288 (1992), *citing Youakim v. Miller*, 425 U.S. 231, 234 (1976). This rule promotes the certiorari review process by denying review of questions that have not been litigated or decided in the lower courts. *See Taylor, supra.* Thus, certiorari review is properly denied when, as in this case, the questions presented have not been resolved in either the district court or the court of appeals. Neither the fourth amended complaint nor the order dismissing certain individual defendants was considered by the court of appeals in denying the underlying petition for writ of mandamus or by the district court in the first instance. Therefore, any consideration of these issues is beyond this

Court's jurisdiction at this time and certiorari should be denied.[9]

D. The petition should be denied because it violates the rules governing preparation of petitions

In addition, Gellert's petition should be denied because it fails to comply with Supreme Court Rule 14.5, which provides that:

> The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying the petition.

In his petition, Gellert does not provide this Court with any basis for invoking this Court's jurisdiction; improperly ar-

---

[9] Gellert also implicitly suggests in his petition that this Court should compel the district judge to recuse himself. Gellert, however, did not seek to recuse the district judge in his petition for writ of mandamus although he did file a memorandum in the court of appeals alleging that the district judge was corrupt and biased. In any event, Gellert has not complied with 28 U.S.C. § 144's requirements for recusal of the district judge in the court's below. *See Hepperle v. Johnston*, 590 F. 2d 609, 611 n.2 (5th Cir. 1979).

gues the merits of the writ in the portion of the petition that is reserved for outlining the constitutional provisions, statutes and treaties which are the subject of the writ; improperly argues the merits of the writ in an unauthorized section entitled "Defendants Defaulted Under Rule 56"; and does not, because he cannot, show this Court when the federal questions sought to be reviewed were first raised in the lower courts, the method and manner of raising the federal questions in the lower courts, and the way in which the federal questions were passed upon below. The result is an inaccurate and misleading portrayal of the proceedings below and an unfounded request to review issues that are currently beyond this Court's jurisdiction. Accordingly, this Court should deny the petition because Gellert failed to present his petition with accuracy, brevity and clarity.

In sum, Gellert has failed to assert any ground upon which this Court's jurisdiction may be invoked and has failed

to demonstrate why certiorari should be granted. Furthermore, Gellert's petition was untimely filed, the question presented is now moot, and an adequate remedy by appeal is available after final judgment is rendered. The petition accordingly should be denied.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities, Respondent Travelers respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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FILED
JAN 27 1995
OFFICE OF THE CLERK

NO. 94-1015

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

DANIEL G. GELLERT,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.

DANIEL G. GELLERT,

Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, an employee benefit pension plan, and EASTERN AIRLINES, INC. solely as Administrator of such defendant plan, and EASTERN AIRLINES PILOTS RETIREMENT BOARD a/k/a PENSION DISPUTE BOARD, through its members, WILLIAM R. TEGTMAN, NOEL HONOHAN, CHARLES COPLAND, JACK N. MOGUS and ALAN C. GIBSON,

Defendants.

_____/

COMPLAINT

Plaintiff, by and through his undersigned counsel, hereby sues the Defendants as follows:

1. This is an action brought by the Plaintiff to recover benefits due him under the Defendant, EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, and to enforce his rights under the plan.

2. This court has jurisdiction of this cause pursuant to Section 502 (a) (1) (B) of the Employee Retirement Income Security Act (ERISA) 29 U.S.C. Section 1132(a) (1) (B).

3. Plaintiff is a vested participant in the Defendant plan by virtue of his employment as a pilot with Eastern Airlines, Inc., (Eastern).

4. The Defendant, EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS (Plan) is an employee pension benefit plan within the meaning of Section 3(2) of ERISA, 29 U.S.C. Section

1002(2). The plan is administered in Dade County, Florida.

5. EASTERN is being sued herein not in its corporate capacity, but solely as Administrator of EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS (Plan).

6. The Defendant, EASTERN AIRLINES PILOTS RETIREMENT BOARD, a/k/a PENSION DISPUTE BOARD (Retirement Board) is established for the purpose of aiding the administration of the Plan with regards to the establishment of eligibility and benefits.

7. The Defendants, WILLIAM R. TEGTMAN, NOEL HONOHAN, CHARLES COPLAND and JACK N. MOGUS, are members of the Retirement Board. ALAN C. GIBSON was a member when the acts complained of herein occurred.

8. Plaintiff was an employee of Eastern on June 15, 1986 when he was injured within the course and scope of his employment as a pilot.

9. From the date of his injury, and continuing to the present, the Plaintiff's injuries are of such a nature and severity that he is physically unable to continue in

employment with Eastern as a pilot.

10. By virtue of the Plaintiff's employment with Eastern as a pilot, the terms and conditions of the Plaintiff's employment were governed under the terms of a collective bargaining agreement between Eastern and the Airline Pilots Association (ALPA). The collective bargaining agreement provides for Plaintiff's participation in the Defendant Plan. A copy of the agreement is attached hereto as Exhibit "1".

COUNT 1

11. Plaintiff realleges the allegations of Paragraphs 1 through 12 above.

12. On or about June 17, 1986, the Plaintiff notified Eastern of his work related injuries. The Plaintiff was placed off job status due to his injuries effective June 16, 1986.

13. In accordance with Plaintiff's desire to obtain disability retirement, the Plaintiff did, commencing in July 1986 and thereafter request a preliminary application for disability retirement from Eastern. Such forms were completed by Plaintiff and submitted to Eastern

immediately after being received.

14. Plaintiff was terminated on October 17, 1986.

15. On December 10, 1986 Plaintiff was advised by A.H. Luecke, Specialist of Pension Administration, as follows:

> In accordance with the Neutral's decision regarding your termination of employment, the previous termination date of June 17, 1986 was set aside and a revised termination date of October 17, 1986 was established. As a result of this decision, you were considered an active employee on the date you elected to establish as your disability retirement date.

A copy of such letter is attached hereto as Exhibit "2".

16. Accordingly, the only matter to be determined by the Retirement Board was whether or not the nature of the disability warranted a disability retirement pension and Plaintiff did request that such determination be made.

17. The Retirement Board never considered the nature and extent of the Plaintiff's disability, but rather, on June 22, 1987, refused the Plaintiff his disability retirement pension solely on the basis that the Plaintiff was not an employee at the time when he applied for his disability retirement pension. A copy of the Retirement Board's decision dated June 22, 1987 is attached hereto as Exhibit "3".

18. The aforestated decision was contrary to the requirements of law, or not supported by competent evidence, arbitrary and capricious and/or an abuse of discretion in that:

A. It is contrary to the fiduciary's (Eastern) own findings that Plaintiff was an active employee on the date he elected to establish as his disability retirement date (Exhibit "2").

B. It is irrelevant and of no legal consequence with regard to the pivotal question the Retirement Board and Dispute Board was to determine (i.e. the nature and extent of Plaintiff's dismissal).

C. Has no legal basis for the denial of the Retirement

Pension Benefit since at the time of injury Plaintiff was an employee of Eastern and fully vested in the Plan.

D. Contrary to the agreement and plan documents in that such agreement and plan documents do not require application for disability retirement pension prior to termination of employment.

E. Contrary to the agreement and plan documents, since such documents establish the fact that pensions, inclusive of disability retirement pensions, are non forfeitable after vesting.

F. Any failure of the Plaintiff to comply with any condition precedent to obtaining such disability retirement pension was as a result of the failure of the plan administrator to supply forms and information necessary to comply with such condition precedent.

19. Since June 15, 1986 and continuing to date, the Plaintiff has a disability which results in his complete inability to continue with Eastern as a pilot. The decision of the State of New York Worker's Compensation Board establishing the disability as of June 15, 1986, dated December 14, 1989 is attached hereto as Exhibit "4".

20. Plaintiff has met all of the requirements set forth in the plan to receive a disability benefit. The Plan, by and through Eastern and its fiduciaries, Retirement Board and its present and past members, has and continues to deny Plaintiff a disability benefit.

21. Defendant's denial of disability benefits to the Plaintiff is in violation of the provisions of the Plan.

22. Alternatively, the fiduciaries of the plan have interpreted its provisions contrary to the requirements of law or in an arbitrary and capricious manner, and/or abused their discretion in interpreting the terms of the Plan, or its decision is not supported by competent evidence, so as to wrongfully deprive the Plaintiff of a disability benefit.

23. Plaintiff has been required to retain the undersigned attorney in order to recover benefits due him under the Plan and is obligated to pay counsel a reasonable attorneys' fee.

24. Plaintiff has exhausted all remedies under the Plan.

25. All conditions precedent to the filing of this

action have been complied with, waived, excused or would have futile.

WHEREFORE, Plaintiff prays that this court determine the Plaintiff's right to a disability benefit under the Plan, or remand this matter for hearing before the Retirement Board on the issue of the extent and nature of Plaintiff's disability and to retain jurisdiction to review such award to assure that such is consistent with the decision of the State of New York Workers' Compensation Commission Board (Exhibit4) and further award such other relief as the court deems necessary including attorneys' fees and costs.

COUNT II

26. Plaintiff realleges and reaffirms all allegations contained in Paragraphs 1-12 as if set forth herein verbatim.

27. On December 28, 1989, Plaintiff's counsel directed a letter to the Defendant requesting that the Defendant provide certain information and documenta-

tion which the Plaintiff is entitled to receive under the terms of the plan and the provisions of ERISA. A copy of the December 28, 1989 letter is attached hereto as Exhibit "5".

28. Defendant (Eastern) has to date failed and refused to provide all the information and documentation as requested in the December 28, 1989 letter, notwithstanding the fact that it did, in April 1990, provide some of the information.

31. As a result of the Defendant's (Eastern) failure to provide the requested information and documentation, Plaintiff has been prejudiced in that he is unaware of his retirement benefits or options.

30. Defendant's (Eastern) failure to provide the information and documentation requested in the December 28, 1989 letter within 30 days is in violation of Section 502 of ERISA, 29 U.S.C. Section 1132.

WHEREFORE, Plaintiff prays that this court enter an order requiring the Defendant to provide the docu-

mentation requested, and further, award the Plaintiff $100.00 per day damages as provided for under ERISA, plus attorneys' fees and costs.

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BY: /s/ NEIL FLAXMAN

NEIL FLAXMAN

FACTS

Daniel Gellert was a pilot with Eastern Airlines, Inc. and participated in Defendant Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots. [1] That plan was administered by Eastern Airlines, Inc. Disputes arising from the Plan were handled by the Pension Dispute Board, established pursuant to the Eastern Airlines Fixed Benefit Retirement Income Plan for pilots, to consider all disputes arising under the interpretation and application of the plan.

The Dispute board is subject to Railway Labor Act regulation and has the authority to affirm or set aside, in whole or in part, the award of the Eastern Benefit Plan. In the alternative, it may remand the proceeding the Plan for further action.

On June 15,1986, Gellert sustained an injury, which the parties agree, occurred within the course of his employment

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1 The Eastern Air Lines Fixed Benefit Retirement Income Plan's history and purpose is reviewed at length in *Vaughter v. Eastern Air Lines, Inc.*, 619 F. Supp. 463 (S.D. Fla. 1985) *aff'd* 817 F.2d 685 (11th Cir. 1987).

and which rendered him incapable of continuing his work as a pilot.

Gellert notified Eastern Airlines of his work related injury on June 17, 1986 and due to his injuries, was removed from "job status" effective June 16, 1986. By July, Gellert completed and submitted to Eastern Airlines his disability retirement forms. He was terminated on October 17, 1986.

In December, 1986, the Pension administrator informed Gellert that the June 17, 1986 termination date was set aside and the revised termination date would be October 17, 1986 (see Exhibit 2 attached to the amended complaint). As a result of that decision to revise the termination date, Gellert would be considered an active employee on the date he elected to retrieve his disability retirement pension.

On June 22, 1987, Gellert's disability retirement pension benefits were denied by the Board based on the Board's finding that Gellert was not an employee at the time he applied for his disability retirement pension. In so finding, the Board effectively found that Gellert was not an employee as of July 1986, completely contrary

to how the Board had otherwise advised Gellert in December of 1986.

Gellert alleges that the Pension Dispute Board's June 22, 1987 ruling was wrong. He seeks to vacate that decision or in the alternative, to remand it for further consideration by the Board claiming he never received a full hearing.

Gellert's amended complaint states that he is suing defendant "Eastern Airlines Pilots Retirement Board [a]s an employee pension benefit plan within the meaning of Section 3(2) of ERISA..." and "Eastern [Airlines] is being sued not in its corporate capacity, but solely as Administrator of Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots."

Standard of Review

Motions to dismiss may not be granted on the basis that the relief prayed for is improper, so long as plaintiffs may be entitled to some relief if they are able to prove their claims. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Since the facts in a motion to dismiss are to be viewed in the light most favorable to the non-movant, [2] these facts are compiled from the Plaintiff's Amended Complaint.

This Court's jurisdiction to review and amend or alter RLA-regulated dispute Board decisions is narrow. Decisions of an adjustment board may be overturned only on the basis of one of the grounds listed in 45 U.S.C. §153 First (q). *Loveless v. Eastern Airlines, Inc.*, 681 F.2d 1272 (11th Cir. 1982).. [3]

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[2] Facts in a motion to dismiss must be viewed with the light most favorable to the non-moving party. *Scheuer v. Rhodes*, 416 U.S. 232 (1976).

[3] Those grounds are review to determine I) if an award is irrational; 2) whether the award draws its essence from the letter or purpose of the collective bargaining agreement and; 3) whether the arbitrator conformed to a specific contractual limitation upon his authority. *Loveless*, 681 F.2d at 1275-76 (summarized in *Vaughter v. Eastern Air Lines, Inc.*, 619 F.Supp. 463 at 469 (S.D. Fla.1985) *aff'd* 817F.2d 685 (11th Cir.1987).

Defendants' Eastern Air Lines Fixed Benefit Plans, Eastern Airlines, Corp., and the Pension Dispute board's Motion to Dismiss

The Defendants argue that the Plaintiff's complaint is time barred by the statute of limitation as articulated in the Railway Labor Act (RLA). 45 U.S.C. § 153 First(r). [4] The RLA statute of limitations provides that:

> "All actions at law based on the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Board, and not after."

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[4] The Railway Labor Act was enacted in 1926. In 1936, the provisions of the RLA were extended to air carriers, excluding §153 which is the section providing for dispute boards to hear grievances between labor and management. 45 U.S.C. §181 Section 201. Section 153, entitled "National Railroad Adjustment Board" was excluded from applying to air carriers because "Congress did not want airline labor controversies to go before the railroad board. Instead, it wanted airline labor to create systems boards of adjustment particularly suited for their industry..." *Association of Flight Attendants v. Republic Airlines, Inc.*, 797 F.2d 352 (7th Cir. 1986).

The Board issued its report on June 22, 1987 and the Plaintiff did not file his complaint until May 9, 1990. If the RLA statute of limitations applies, the claim is time barred because it was filed beyond the two year limitation.

The Plaintiff disputes application of the RLA's two-year statute of limitations and maintains that the complaint should be governed by ERISA's three-year statute of limitation. His argument is based on the language of the complaint which he states is clearly brought against Eastern Airlines Pilots Retirement Board and Eastern Airlines, Inc. as the administrator of the Retirement Plan, pursuant to ERISA. The ERISA statute of limitations states:

> "No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of...(2) three years after the earliest date (A) on which the

> plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could resaonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title...." ERISA, 29 U.S.C. §1132 (a) (2).

Should this statute of limitation apply, the plaintiff's complaint is timely.

Additionally, the defendants argue that the Plaintiff's claim, challenging the meaning of the Dispute Board's review of his claim, has the equivalent effect of calling for an interpretation of the terms of the plan and therefore, takes the claim outside the scope of ERISA.

Analysis

Eastern Airlines Pension Dispute Board was created by a collective bargaining agreement within the

meaning of 45 U.S.C. §184.[5] By its own terms, it is subject to all provisions of the RLA. The defendant claims that this coverage includes application of the statute of limitations. To apply the ERISA statute of limitations would serve to alter, or even supersede, the RLA's pro-

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[5] The amended complaint recites §11.2 of the Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots which provides:

> All disputes concerning the application, interpretation or administration of the Plan in respect to individual employees and their participation in or their benefits under the Plan shall be heard and determined by the Pension Dispute Board as the appropriate named fiduciary in accordance with Section 503(2) of ERISA. Said Pension Dispute Board is the appropriate adjustment board under Section 204 of the Railway Labor Act for the determination of all such disputes.

Section 503(2) of ERISA, 29 U.S.C. §1133(2) provides, "...every employee benefit plan shall..(b) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." All board decisions are final and binding on both parties to the dispute. *Vaughter v. Eastern Airlines, Inc.*, 619 F. Supp. 463 (S.D. Fla. 1985) *aff'd*817 F.2d 685 (11th Cir. 1987).

visions and would be contrary to legislative intent.[6]

The complaint, however, states that the action against Eastern Airlines, Inc. and the Board's directors is based on a breach of fiduciary duty, thereby making it unnecessary for this Court to address the issue of whether ERISA preempts the RLA. Limitations on actions by employees brought only against their union for breach of the duty of fair representation do not fall under the provisions of 45 U.S.C. §153(First)(r) of the Railway Labor Act, as that section, by its own terms, applies only to disputes between an employee or group of employees and a carrier or carriers. *Ranieri v. United Transportation Union,* 743 F.2d 598 (7th Cir. 1984) citing to *Conley v. Gibson*, 355 U.S. 41, 44 (1957).

Claims of fiduciary violations under ERISA are statutory claims that are independent from a suit seeking judicial review of the coverage under the pension plan. *Bonin v. American Airlines, Inc.*, 621 F.2d 635 (5th Cir. 1980).

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[6] Section 514(d), 29 U.S.C. 1144(d) states: "Nothing in this subchapter shall be construed to alter, amend, modify, impair, or supersede any law of the United States [except where specifically provided] or any rule or regulation entered under any such law."

Here, the plaintiff's complaint states that the dispute is strictly against the named defendant's in their fiduciary capacity. That being the case, then the ERISA statute of limitations would apply and the claim would not time-barred.

However, the Defendant's second argument brings to light the validity of naming Count I a Claim for Breach of Fiduciary Duty. The gravamen of Count I is that the hearing was insufficient or that the Dispute Board was incorrect in their findings. Though the claim simply opposes the Dispute Board's findings, the Plaintiff has clothed as breach of fiduciary duties. Simply recharacterizing a claim does not make it any less a dispute of the Board's findings and thus, is insufficient to evade application of the RLA. *Andrews v. Louisville & N.R. Co.*, 406 U.S. 320 (1972).

In *Andrews*, a former railroad employee was discharged following an accident which rendered him physically unable to work. The Defendant Railroad argued that the Plaintiff's remedy was to be found within the RLA governed

labor dispute board. By not taking his claim before the dispute board for arbitration, he had failed to exhaust his administrative remedy and his claim merited dismissal. The Plaintiff sued the railroad alleging wrongful discharge and sought recovery of damages for loss of past and future income, and for attorney's fees. He argued that his claim fell outside of the RLA arbitration regulations because he was suing for wrongful discharge after he was severed, as an employee, from the Railroad.

Unconvinced, the Supreme Court explained that the employee's decision to sever his connection with the railroad in an attempt to have his claim treated as a breach of employment contract was not sufficient to render different treatment from normal disputes over the interpretation of a collective-bargaining agreement. *Id* at 323. Similarly here, the Plaintiff has brought his case as a breach of fiduciary duty claim, rather than a claim disputing the Board's decision. However, it is no different than if he outright challenged the review board's

decision without the breach of fiduciary claim. Furthermore, nothing in the claim sets it apart as a breach of fiduciary duty and as such, the case is governed by Section 11.2 of the Plan.[7]

Wherefore, the Defendants' motion to dismiss Count I is granted.

Defendants Mogus and Copeland's Motion to Dismiss

Any action against the members of a RLA dispute board must be dismissed since members of dispute boards may not be held personally answerable for their action in resolving disputes that come before the Board. Radin v. United States, 699 F.2d 681 (4th Cir. 1983); *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 159 (2nd Cir. 1979), *cert denied*, 449 U.S. 854 (1980) *reh'g denied* 449 U.S. 1026 (1980). That is true even if the action is governed by ERISA. *International Union, United Auto., etc. v. Greyhound Lines, Inc.*, 701 F.2d 1181 (6th Cir. 1983) (duties and liabilities arising under ERISA are not enforceable against an arbitrator who acts in his official capacity). Therefore, any claims against Defendants Mogus and

---

[7] See note 5.

Copeland cannot survive. The motion to dismiss Count I is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of September, 1991.

s/s FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE
FEDERICO A. MORENO

copies provided:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI FLORIDA

Case No. 90-1113-CIV-MORENO

DANIEL G. GELLERT,
Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, an employee benefit pension plan, and EASTERN AIRLINES, INC. solely as Administrator of such defendant plan, PENSION BENEFIT GUARANTY CORPORATION, AIRLINE PILOT ASSOCIATION, EASTERN AIRLINES PILOTS RETIREMENT BOARD a/k/a PENSION DISPUTE BOARD, ALAN C. GIVSON, WILLIAM R. TEGTMAN, JACK N. MOGUS CHARLES COPELAND, and the TRAVELERS INSURANCE CORPORATION.
Defendants.

_____/

Felice Busto, Esq.

FIRST AMENDED COMPLAINT

NATURE OF THE ACTION

1. Plaintiff Daniel Gonzales Gellert ("Gellert") brings this action for damages, compensatory and punitive, under the Racketeer Influence and Corrupt Organization Act, 18 U.S.C. ## 1961 et seq. ("RICO"), the Employee Retirement Income Security Act ("ERISA") 29 U.S.C. Sections 1132 (a) (1) (B); 502 (a) (1) (B); 510 #1140, 511 #1141; 403 (c) (1) #1103 (c) (1); 404 (a) (1) (A); 1104 (a) (1) (A); 406 (a) (1) and (b) #1106 (a) (1) (b); Section 1983 as secured by the Constitution and Laws of the United States for injury under the color of law, due process rights and under the statutory and common law of the State of Florida, and under the appropriate laws of Workers' Compensation Board.

PARTIES

2. Plaintiff is a vested participant in the Defendant plan by virtue of his employment as a pilot with Eastern Airlines, Inc. ("EASTERN"), a resident of Florida, and illegal acts that are subject of this Complaint oc-

curred and are occurring in this district.

3. The Defendant, Eastern Airlines Fixed Benefit Retirement Income Plan For Pilots ("Plan") is an employee pension benefit plan within the meaning of Section 3(2) of ERISA, 29 U.S.C. Section 1002(2). The Plan is administered in Dade County, Florida.

4. Eastern is being sued herein not in its corporate capacity but solely as Administrator of Eastern Airlines Fixed Benefit Retirement Income Plan For Pilots, (Plan).

5. Defendant, Eastern Airlines Pilots Retirement Board, a/k/a Pension Dispute Board (Retirement Board) is established for the purpose of aiding the administration of the Plan with regards to the establishment of a eligibility and benefits based solely upon the strict language of the Plan as a fiduciary.

6. Defendant Pension Benefit Guaranty Corporation ("PBGC") is trustee of the Plan as authorized under Section 4042(c) of ERISA, 29 U.S.C. # 1342(c) and as such has the obligation to pay from available assets Plaintiff's liability for the disability benefit pen-

sion which became due prior to the termination of the Plan on October 4, 1990, under Section 4044(a) of ERISA, 29 U.S.C. # 1344(a) ; 29 CFR # 2618.3.

7. Defendant Airline Pilots Association, International ("ALPA") is an unincorporated labor organization with its principal office in Washington, D.C. and represented the Eastern pilots pursuant to certification issued by the National Mediation Board, and has an office in this jurisdiction, and by law had a duty of fair representation liability to the Plaintiff as to rights arising from employment and retirement under the ERISA Plan.

8. Defendant Travelers Insurance Corporation is an agent and carrier of insurance for Defendant Eastern as to Workers' Compensation Board occupational injury, and as to employee medical coverage of employed, disabled and retired Eastern pilots.

9. Defendant Alan C. Gibson is an official, a corporate officer of Eastern, the responsible official who attempted to discharge the Plaintiff from his Eastern pilot employment, and as a fiduciary under ERISA was the

Chairman of Defendant Pension Dispute Board recorded in an unlawful conflict of interest.

10. Defendant William R. Tegtman is an official of Defendant Eastern and a member of the Pension Dispute Board.

11. Defendant Charles H. Copeland is a union official of ALPA, member of Council 51 LEC, Chairman of the Master Executive Council, the highest ALPA official on Eastern, also a member of the Pension Dispute Board, a fiduciary position, and participant in the plan, resides in Setawket, New York.

12. Defendant Jack N. Mogus is a member of the ALPA Council 79 Local Executive Council ("LEC") and a member of the Eastern Master Executive Council ("MEC"), a member of the Pension Dispute Board ("PDB") and resides in Vienna, Virginia.

JURISDICTION AND VENUE

13. This Court has jurisdiction of this action under 18 U.S.C. # 1965(a) (RICO) 28 U.S.C. ## 1331 (federal question); and by 28 U.S.C. ## 1337 as under

an act regulating commerce; ERISA; and Section 1983 as secured by the Constitution and Laws of the United States for injury suffered under the color of law; and general principles of pendent jurisdiction.

14. Venue is proper in this District pursuant to 18 U.S.C. # 1964(a) and (b), and 28 U.S.C. 1391. Defendants do business in this District and illegal acts complained of occurred and are occurring in this District, and defendants reside, are found, have agents, or transact their affairs in this District.

15. Plaintiff's damages in this Complaint are over the established legal limit, and this Complaint is for $3,000,000.00 in compensatory damages.

FACTUAL BACKGROUND

16. Plaintiff was an employee of Eastern on June 15, 1986 when he was injured within the course and scope of his employment as a pilot.

17. Plaintiff was assigned as Captain of Eastern flight 909, and L-1011 aircraft departing Miami, Florida, and unairworthy aircraft in which the Plaintiff had to land some 15 tons above the maximum allowable struc-

tural weight with some three hundred passengers, made a second takeoff, forcing the Plaintiff to discharge (dump) in flight some 5,000 gallons of jet fuel to made a second emergency landing in Miami,. Florida.

18. Plaintiff was injured while moving on ladder to inspect his unairworthy aircraft.

19. Plaintiff was not aware, a matter which has been fully adjudicated and is documented in PLEA AGREEMENT 90 CR 629 (ILG) in the United States District Court Eastern District of New York, in which Eastern Airlines, Inc. pleaded guilty to defrauding the United states and the passengers of Eastern, as through the operation of unairworthy aircraft and the falsification of required documents.

20. Plaintiff in his Eastern employment as of February 11, 1963 has been an outstanding pilot employee, highly responsible, professional and providing safe flight operations to his passengers.

21. From the date of his injury on June 15, 1986, and continuing to present, Plaintiff's injury has been determined by the Eastern Medical Department, the Florida

Knee Center, the Mayo Clinic, the Workers' Compensation Board, Eastern and its insurance carrier Travelers Insurance Company to be of such nature and severity that he is and has been unable to continue his employment with Eastern as a pilot, employment which requires the carrying of some 60 pounds between aircraft assignments at a rapid pace.

22. Plaintiff's disability has been deemed as permanent by stipulation before the Workers' Compensation Board.

23. During the period material to this action, defendants Eastern and ALPA their agents, employees and officers were locked in a bitter fight for the control of Eastern, the loyalty and support of the Eastern employees, rising to a well documented violation of RICO, resulting in criminal charges against Eastern by the United States.

24. During the period material to this action, ALPA had the duty of fair representation ("DFR") of all Eastern pilots under federal law, The Railway Labor Act ("RLA") as an exclusive bargaining agent, (45 U.S.C.

#152).

COUNT I

25. Plaintiff realleges the allegations of paragraphs 1 through 24 above.

26. Defendant ALPA breached its duty of fair representation of Plaintiff's ERISA and Plan rights to the disability benefit pension resulting from his occupational accident on June 15, 1986.

27. Plaintiff's rights are final and binding due to the December 18,1987 Eastern Airlines Medical Department Examination under Section 3.6 (d) (ii) of the Plan, **(EXHIBIT1)**, and the followup examinations by the same and exact medical doctor on February 11, 1991 **(EXHIBIT 2)**, March 26, 1991 **(EXHIBIT 3)**, Independent Medical Examiner ("IME") by Mayo Clinic on December 18, 1986, February 28, 1991 **(EXHIBIT 4)** , January 22, 1992 **(EXHIBIT 5)**, The Florida Knee Clinic dated February 14, 1991 **(EXHIBIT 6)**, and the Workers' Compensation Board decisions awarding the maximum ambulatory compensation award.

COUNT II

28. Plaintiff realleges the allegations of paragraph 1 through 27 above.

29. Defendants ALPA, Copeland, Gibson, Mogus, Tegtman with others conspired to defraud the Plaintiff of ERISA, Plan and other employee benefits due and payable as of the onset of the occupational injury disability on June 15, 1986.

30. Defendants as a matter of conspiracy made false material representations for the purpose to defraud Plaintiff, refused to apply the same standard in providing the ERISA Plan benefits as they have to others, including but not limited to Jack N. Mogus, Robert Shipner.

COUNT III

31. Plaintiff realleges the allegaations of Paragraphs 1 through 30 above.

32. Defendant PBGC as a matter of conspiracy with the other Defendants has breached its duty under ERISA to provide the Plaintiff's disability benefit pension based upon fiction, refused to abide by the final and binding decision by the Easstern Medical Department under Section 3.6 of the Plan on December 18,

1987. The PBGC continues to make new and unreasonable demands on the Plaintiff, refuses to submit this matter to the Eastern Medical Department or to selected Independent Medical Examiners under the Plan, refused this disability benefit pension by stating that one of the PBGC's non medical clerks could over turn medical reports based upon medical examinations by competent and universally recognized medical authorities.

COUNT IV

33. Plaintiff realleges the allegations of Paragraphs 1 through 32 above.

34. Defendants in a conspiracy to defraud the Plaintiff of ERISA, Plan and other earned employee benefits in a clear and intentional violation of ERISA Section 510 # 1140 discharged Plaintiff's employment on June 17, 1986 for the purpose of interfering with the attainment to the disability benefit pension, to which he became entitled to on June 15, 1986.

COUNT V

35. Plaintiff realleges the allegations of Paragraphs 1 through 34 above.

36. Defendants used fraud in violation of ERISA Section 511 #1141 to defraud the Plaintiff of vested and earned ERISA Plan benefits, continue to retrain, intimidate to interfere with the exercise of rights to the disability benefit pension.

COUNT VI

37. Plaintiff realleges the allegations of Paragraph 1 through 36 above.

38. Defendants in an intentional violation of Section 1983 injured the Plaintiff under the color of law, through treatment different then others, claiming rights under the RLA, ERISA, the Plan, Workers' Compensation Board Law, the PBGC internal procedures, DFR, due process, arbitration, court procedures and have refused earned benefits to cause the Plaintiff followng his disability injury on June 15, 1986.

46. Defendant PBGC has ruled in Plaintiff's favor, but the PBGC has then joined the ongoing conspiracy to defraud the Plaintiff based upon the violation of ERISA Sections 510 and 511, based upon a subsequent discharge of employment some four months after the onset of the disability injury on June 15, 1986, and the Defendant's unlawful argument in fraud, as an intentional violation of Section 510 based upon the claimed right to discharge the Plaintiff on October 17, 1986 for the purpose of interfering with the attainment to the ERISA Plan disability benefit pension.

COUNT IX

47. Plaintiff realleges the allegations of Paragraphs 1 through 46 above.

48. Defendants have not provided Plaintiff all the information and documentation as requested in the December 28, 1989 letter, notwithstanding the fact that it did, in April 1990, provide some of the information.

49. Defendants have since December 1984 to

(a) judgment granting the disability benefit pen sion;

(b) payment of legal fees as authorized under ERISA

(c) legal representation by ALPA under the duty of fair representation;

(d) an award to Plaintiff Gellert of such damages as it shall prove at trial in an amount not less than $3,000.000.00, trebled as mandated by 18 U.S.C. #1964(c) and Florida Statute # 772.104;

(e) an award of punitive damages to Plaintiff Gellert in an amount no less than 5 million dollars;

(f) an award to Plaintiff for the cost of this action, together with attorney fees pursuant to RICO;

(g) award $100.00 per day from January 1985 to date of judgment for violation of 502 ERISA 29 U.S.C. # 1132.

(h) an award to Plaintiff both pre-judgment and post-judgment interest on their actual damages, at the highest interest rate per mitted by law;

(i) an award to Plaintiff any such different or further relief this Court may deem just and proper.

PLAINTIFF DEMAND THAT THIS ACTION BE TRIED BEFORE A JURY.

January 25, 1992

s/s DANIEL GONZALES GELLERT pro se.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

Case No. 90-1113-CIV-MORENO

DANIEL G. GELLERT,

Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS et al.,

Defendants.

_____/

THIS CAUSE came before the Court sua sponte. By Order dated January 10, 1992, this Court granted Plaintiff's Motion to Amend his Complaint. Plaintiff's Amended Complaint was filed on January 25, 1992. A

review of the Amended Complaint reveals that Plaintiff has included Counts and named Defendants which were previously dismissed pursuant to this Court's Memorandum Opinion of September 6, 1992. Therefore, it is

ADJUDGED that the Plaintiff's Amended Complaint is STRICKEN. Plaintiff is granted Leave to file a Second Amended Complaint within 20 days of this Order. The Second Amended Complaint **SHALL NOT** include reference to any Counts or any Defendants previously dismissed by Order of this Court.

DONE AND ORDERED in chambers at Miami, Florida, this 13th day of February, 1992.

s/s FEDERICO A. MORENO

UNITED STATES DISTRICT JUDGE

copies provided:
Daniel G. Gellert
Maurice J. Baumgarten, Esq.
Karen L. Morris, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI, FLORIDA

CASE NO.: 90-1113-CIV-MORENO

DANIEL G. GELLERT,

Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, an employee benefit pension plan, and EASTERN AIRLINES, Inc. solely as Administrator of such defendant plan, PENSION BENEFIT GUARANTY CORPORATION, AIR LINE PILOTS ASSOCIATION, EASTERN AIRLINES PILOTS RETIREMENT BOARD a/k/a PENSION DISPUTE BOARD, ALAN C. GIBSON, WILLIAM R. TEGTMAN, JACK N. MOGUS, CHARLES COPELAND AND THE TRAVELERS INSURANCE CORPORATION,

Defendants.

_____/

THIRD AMENDED COMPLAINT

NATURE OF ACTION

1. Plaintiff, Daniel Gonzales Gellert, ("Gellert")

inflict permanent and severe emotional distress.

E. Defendants used the ERISA Plan in an unlawful manner in violation of RICO in denying ERISA Plan benefits to enforce the RLA Eleventh, "union security" provisions as to the forced collection of union dues.

JURISDICTION AND VENUE

2. This Court has jurisdiction of this action under 18 U.S.C. # 1965(a) (RICO) 28 U.S.C. ## 1331 (federal question); and by 28 U.S.C. ## 1337 as under an act regulating commerce; 29 U.S.C. # 1101 ERISA; 45 U.S.C. # 151 RLA;and 42 U.S.C. 1983 as secured by the Constitution and Laws of the United States for injury suffered under the "color of law" and due process; and general principles of pendent jurisdiction and rights under the Seventh Amendment.

3. Venue is proper in this District pursuant to 18 U.S.C. # 1965(a) and (b), and 28 U.S.C. 1391. Defendants

do business in this District and illegal acts complained of occurred and are occurring in this District, and defendants reside, are found, have agents, or transact their affairs in this District.

4. Plaintiff's damages in this Complaint are over the established legal limit, as this Complaint is for $3,000,000.00 in compensatory damages.

STATUE OF LIMITATIONS

5. Plaintiff's complaint as to Defendant ALPA's breach of duty of fair representation was on or about January 27, 1992.

6. Plaintiff's denial of ERISA and Plan benefit disability pension was denied by Defendant PBGC on or about June 12, 1991.

7. Plaintiff was notified on or about October 9, 1991 that Defendant Alan C. Gibson, ("Gibson") discharged Plaintiff's employment during 1986, then denied his ERISA

rights as a fiduciary and Chairman of the Pension Dispute Board, ("PDB").

PARTIES

8. Plaintiff is a vested participant in the Defendant Plan by virtue of his employment as a pilot with Eastern Airlines, Inc., ("Eastern"), a resident of Florida, and the illegal acts that are the subject of this Complaint occurred and are occurring in this District.

9. Defendant Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots ("Plan"), is an employee benefit Plan within the meaning of Section 3(2) of ERISA, 29 U.S.C. Section 1002(2). The Plan is administered in Dade County, Florida.

10. Eastern is being sued herein not in its corporate capacity but solely as Administrator of Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots, ("Plan").

11. Defendant Eastern Airlines Pilots Retirement

Board, a/k/a Pension Dispute Board, ("PDB") is established for the purpose of aiding the administration of the Plan with regards to the establishment of eligibility and benefits based solely upon the strict language of the Plan as fiduciary.

12. Defendant Pension Benefit Guaranty Corporation, ("PBGC"), is trustee of the plan as authorized under Section 4042(c) ERISA, 29 U.S.C. 1342(c) and as such has the obligation to pay from available assets Plaintiff's liability for the disability benefit pension which became due prior to the termination of the Plan on October 4, 1990, under Section 4044(a) of ERISA, 29 U.S.C. # 1344(a); 29 CFR # 2618.3.

13. Defendant Air Line Pilots Association, International ("ALPA") is an unincorporated labor organization with its principal office in Washington, D.C. and represented the Eastern pilots pursuant to certification issued by the National Mediation Board, and has an office in this jurisdic-

brings this action for damages, compensatory and punitive, under the Racketeering Influence and Corruption Organization Act, ("RICO"), 18 U.S.C. # # 1961 et seq, the Employee Retirement Income Security Act, ("ERISA"), 29 U.S.C. 1101 et seq, the Railway Labor Act, ("RLA"), 45 U.S.C. #151 et seq, 42 U.S.C. Section 1983 et seq, as secured by the Constitution and laws of the United States for injury under color of law, due process, civil rights, access to court and jury trial, and under the statutory and common laws of the State of Florida and under the appropriate laws of the Workers' Compensation board laws covering Plaintiff's rights.

A. Plaintiff's rights under ERISA and the Eastern Airlines Fixed Benefit Retirement Plan for Pilots, ("Plan"), was denied by Defendant Pension Benefit Guaranty Corporation, ("PBGC"), on June 12, 1991.

B. Plaintiff has been denied any access to Plan

funds as of Plaintiff's disability injury dated June 15, 1986, as a matter of fraud, conspiracy in violation of Sections 510 and 511 of ERISA, 1140 and 1141, through the commission of bribery, extortion, mail and wire fraud, breaches of known legal duties, based upon more than two predicate crimes, in an existing enterprise, as a pattern of racketeering activity within a ten year period of time, in violation of RICO.

C. Defendants and their attorneys in violation of Section 511 ERISA conspired to defraud the Plaintiff in violation of Section 1983 when under the color of law made material misrepresentations in Court to injure the Plaintiff and deny his rights under the Constitution law and civil rights.

D. Defendants interfered with Plaintiff's Plan and contractual rights, employment rights, defamed, injured and in other means harmed him, his property, his person to

tion, and by law had a duty of fair representation liability to the Plaintiff as to rights arising from employment and retirement under ERISA and the Plan.

14. Defendant Travelers Insurance Corporation is an agent and carrier of insurance for Defendant Eastern as to Workers' Compensation Board occupational injury, and as to medical coverage of employees, retired and disabled former employee pilots.

15. Defendant Alan C. Gibson is an official, a corporate officer of Eastern, the responsible official who attempted to discharge the Plaintiff from his Eastern employment, and as a fiduciary under ERISA was the Chairman of the Defendant Pension Dispute Board documented in an unlawful conflict of interest in this cause.

16. Defendant William R. Tegtman is an official of Defendant Eastern and a member of Defendant Pension Dispute Board.

17A. Defendant Jack N. Mogus is an ALPA official member of the Master and Local Executive Council, a Plan participant and a member of the Pension Dispute Board.

17B. Defendant Charles H. Copeland is an ALPA official as the Chairman of the Master Executive Council, a Plan participant and a member of the Pension Dispute Board.

PREDICATE CRIMES

18. Within, and in the all in compassing past ten years from this date, Defendants were an enterprise engaged in a pattern of racketeering which injured Plaintiff.

19. Defendant ALPA in violation of RICO, in an unlawful conspiracy, confederation and combination, by design defrauded Plaintiff through the forced collection of non required payments of money which was used by ALPA for other then the administration or negotiation of an agreement.

20. ALPA and the other Defendants in this con-

spiracy knew, had personal and legal knowledge that this action was an economic crime of extortion to compel payment which was not owed, or in any other lawful means required to be paid by the Plaintiff.

21. Defendant ALPA in a conspiracy with the others Copeland, Mogus, Tegtman, Gibson, the Plan Administrator as a matter of retaliation for refusal to meet Defendants' extortion demands, denied and in other means taken away Plaintiffs' money under the ERISA Plan, in violation of Section 511, a criminal statute.

22. Defendants unlawfully bribed a neutral hired by Plaintiff, asked to become Defendants' employee in giving opinion which would and did hold Plaintiff's discharge from his Eastern employment for money which was paid and received by the neutral unlawfully from Defendants.

23. Defendants used this decision to defraud Plaintiff.

24. Defendants, William T. Tegtman, ("Tegtman"), Charles Copeland, ("Copeland"), Jack N. Mogus, ("Mogus") and Gibson breached their know legal duties though omission, concealment and fraud failed to disclose to Plaintiff that the PDB Chairman Gibson was the Eastern official who discharged and approved the Plaintiff's termination of his Eastern employment on June 17, 1986. This act was the result of an unlawful conspiracy to defraud the Plaintiff of ERISA Plan benefits, and Defendants did defraud Plaintiff in violation of ERISA 510 and 511, under Section 1983, the color of law, violating RICO.

25. Defendants' agents Gary Green, Felice Busto and Robert Kofman had personal knowledge that Copeland and Mogus were officials of defendant ALPA, participants of the instant Plan, and that Mogus while denying Plaintiff his retirement under the Plan, received his benefit retirement as a bribe.

26. Defendants under the color of law claimed privilege as arbitrators, arbital immunity, under the color of law and in the furtherance of the unlawful violation of RICO have to date continued as a group of individuals associated together for a common purpose of engaging in a course of conduct with an ongoing organization and with various associates functioning as a continuing unit, associated in fact, which has to date resulted in fraud and other unlawful activity through the use of interstate mail and wire, have hurt, injured and defrauded the Plaintiff or earned and vested rights, large sums of money, injured him in his person and property.

27. Defendant PBGC, through its official Robert Joy informed Plaintiff during October 1990 to take less money from the Plan because the PBGC will play around with his ERISA Plan benefit for two years, and then refuse his money as a matter of policy.

28. To date, the last sixteen months, Defendant carried out this threat and Plaintiff has not received any money from his benefit Plan, while Defendant Mogus filed later then the Plaintiff has received his benefit pension for years as through the unlawful bribe.

29. Defendants have committed felony crime, to which Eastern and others have plead guilty, a matter just noticed to Plaintiff, as documented in the Untied States District Court Eastern District of New York, Case No. 90 CR 629 (ILG) dated February 1991, which is conviction for conspiracy to defraud the United States by impeding and impairing the lawful functions of the FAA, in violation of 18 U.S.C. Sections 371, 1001.

30. Plaintiff refused to join and in any other means to assist, engage or participate in the criminal activity of the defendants on June 15, 1986, and refused to make a third take off in an unairworthy L-1011 aircraft in the fur-

therance of the Defendants on going criminal enterprise.

31. Defendants retaliated and denied Plaintiff's ERISA Plan rights immediately following Plaintiff's lawful actions, in fact making him a victim under RICO, and Defendants are engaged in an on going conspiracy to defraud him through an alleged discharge by Gibson on June 17, 1986.

FACTUAL BACKGROUND

32. Plaintiff realleges the allegations of Paragraphs 1 through 31 above.

33. Plaintiff was an employee of Eastern Airlines, Inc. on June 15, 1986 when he was injured within the course and scope of his employment as a pilot.

34. Plaintiff was assigned as Captain of Eastern flight 909, an L-1011 aircraft department Miami, Florida, an unairworthy aircraft in which the plaintiff had to land some 15 tons above the maximum allowable structural weight with

some three hundred passengers, made a second takeoff, forcing Plaintiff to discharge (dump) in flight some 5,000 gallons of jet fuel and make a second emergency landing in Miami, Florida.

35. Plaintiff was injured while moving on ladder to inspect his unairworthy aircraft.

36. Plaintiff in his Eastern employment as of February 11, 1963 has been an outstanding pilot employee, highly responsible, professional and providing safe operations to his passengers.

37. From the date of his injury on June 15, 1986, and continuing to present, Plaintiff's injury has been determined by the Eastern Medical Department, the Florida Kree Center, the Mayo Clinic, the Workers' Compensation Board, Eastern and its insurance carrier the Travelers Insurance Company to be unable to continue his employment with Eastern as a pilot, employment which required the carrying

of some 60 pounds between aircraft assignments as a rapid pace some distance.

38. The Court in this action has established the following facts, which are prima facie, and are provided to prove the Plaintiff's case:

> "On June 15, 1986, Gellert sustained an injury, which the parties agree, occurred within the course of his employment and which rendered him incapable of continuing his work as a pilot. Gellert notified Eastern Airlines of his work related injury on June 17, 1986 and due to his injuries, was removed from "job status" effective June 16, 1986. By July, Gellert completed and submitted to Eastern Airlines his disability retirement forms. He was terminated on October 17, 1986." (See: ORDER GRANTING MOTION TO DISMISS COUNT I. pages 2 & 3).

39. Plaintiff's disability has been deemed permanent in stipulation before the Workers' Compensation Board by Defendants Eastern and Travelers Insurance Company ("Travelers").

40. During the period material to this action,

Defendants Eastern, ALPA, their officers, employees, agents were locked in a bitter fight for the control of Eastern, the loyalty and support of the Eastern employees, rising to documented violations or RICO, resulting in criminal charges against Eastern and others by the United States.

41. During the period material to this complaint, ALPA had the duty of fair representation ("DFR"), of all Eastern pilots under federal law, The Railway Labor Act, ("RLA"), as an exclusive bargaining agent, 45 U.S.C. # 152.

42. Travelers has failed and refused to provide employee health benefit coverage to plaintiff and his dependents, as a matter of conspiracy to harm and injure him.

43. ALPA has denied Plaintiff's First Amendment rights through the forced payment to support ALPA's publicity.

44. ALPA unlawfully required non ALPA pilots

to pay union dues which were used by ALPA for activities other then the negotiating and administering the contract.

45. ALPA used these forced funds to advertise, promote ALPA policy, and in all other means promote its self interest in matters to which non ALPA pilots were firmly opposed under the First Amendment and free speech.

46. ALPA knew of should have known that the extraction of dues beyond the amount required to pay for the negotiation and administration of the contract was used for forcing ideological conformity and other actions in contravention of the First Amendment and violated Plaintiff's Fifth Amendment.

47. ALPA has unlawfully, in a conspiracy with the other Defendants moved the enforcement of the union security clause of compulsory union membership and the forced collection of union dues under Section 2(11) of the RLA to include the unlawful denial of ERISA Plan benefits

in violation of Section 510, in the discharge of the Plaintiff to interfere with the attainment of the disability benefit pension, to which he became eligible as an Eastern pilot employee on June 15, 1986.

48. ALPA through its officers Copeland and Mogus conspired with other Defendants in violation of ERISA Section 511 # 1141 to defraud the Plaintiff of earned and vested ERISA Plan benefits, continue to restrain, intimidate to interfere with the exercise of rights to the disability benefit pension.

49. Plaintiff received by U.S. Mail **(Exhibit 1)**, letter dated May 1, 1985, to which Plaintiff returned **(EXHIBIT 2)**, dated June 1, 1985 authorizing union dues deduction.

50. Plaintiff, again returned authorization for the deduction of union dues, **(Exhibit 3)**, received **(Exhibit 4)** applied for membership **(Exhibit 5)**, this matter was con-

ducted through interstate commerce, mislead the Plaintiff, while Plaintiff was attempting to become a member as to ALPA's instruction, ALPA requested Plaintiff's discharge.

51. Plaintiff paid the union dues in question, they were accepted by ALPA and to date kept.

52. To date ALPA has not granted Plaintiff membership and contravened RLA Eleventh (a) since membership to Plaintiff was not available upon the same terms and conditions as were generally applicable to any other member.

53. Defendants contravened RLA Eleventh (b) through the refusal to deduct union dues following Plaintiff's submission of authorization of union dues deductions.

54. ALPA breached its duty through the failure to defend Plaintiff's rights in this matter after ALPA decided to accept the payment of union dues. At that point, any further controversy was solely between Defendants Eastern and ALPA under law.

55. Defendants in violation of Section 1983 only discharged Plaintiff and reinstated all other pilots in the same and similar situation.

56. Defendant ALPA was using forced contract maintenance fee's for legal and professional fees, strike support as to Continental Airlines, strike benefits, flight attendant, communications as to United Airlines, non of these were authorized by Plaintiff as a non ALPA member, Defendants' forced collection of funds for these activities are unlawful, and constituted an economic crime of extortion for which ALPA had the Plaintiff loose his employment and retirement under the ERISA law and the Plan. **(Exhibit 6)**.

57. Plaintiff's employment with Eastern Airlines, Inc. was governed by federal regulations, in interstate and international flight operations, from at least July 24, 1985, as L-1011, A-300 and B-757 Captain.

58. At least of July 24, 1985, Defendants were

involved in criminal activity of conspiracy and fraud, felony crimes to which Eastern plead guilty of felony violations Title 18. U.S.C. Sections 371 and 1551, et seq.: did unlawfully, wilfully and knowingly conspire, combine, confederate and agree to defraud the United States, (Count I); falsify and conceal; (Count VII) falsify and conceal; (Count XVI), falsify and conceal; (Count XXII), falsify and conceal; (Count XXV), falsify and conceal; (Count XXXVI), in violation of Sections 1001, 3623 and 2. See: Plea Agreement 90 CR 629 (ILG) United States District Court Eastern District of New York, United States against Eastern Air Lines, Inc. February 1991.

59. Plaintiff is a victim of the crimes described above.

60. Plaintiff's ERISA and Plan rights were guaranteed as of his occupational disability date on June 15, 1986 by the Plan's Section 13.6, in that the status of a Pilot is

changed that he no longer is a Pilot, the Pension and other benefit he is entitled to under the Plan shall remain payable in accordance with the terms and conditions of this Plan, and Defendants conspired to deny this provision of the Plan through the efforts of Gibson, Mogus, Tegtman, Copeland, and others did knowingly and intentionally falsify, scheme and device a material fact to defraud Plaintiff of Plan provisions granting the disability benefit pension, breaching known legal duty in violation of Section 1983, under the color of law, in violation of RICO.

61. Defendant ALPA has paid for attorneys to continue Defendants unlawful actions to defraud Plaintiff of his vested ERISA Plan benefits, and to use this case to force other non ALPA pilots to pay contract maintenance fees, beyond those funds required to cover the negotiations and administration of the contract.

62. Defendant ALPA breached its duty of fair

representation of Plaintiff's rights under the Plan, to continue its economic crime of extorting large sums running into millions of dollars, and breached its known legal duty.

63. Defendants refused to rehire Plaintiff on the orders of Defendant Gibson, and violated Section 1983 and Plaintiff's civil rights based upon discrimination.

64. Plaintiff realleges the allegations of Paragraph 1 through 42 above.

65. Defendants have denied, taken away, and to date have refused to release any funds from the Defendant Plan, in violation of ERISA and the terms of the Plan.

66. Plaintiff's rights are final and binding due to the December 18, 1987 Eastern Airlines Medical Department report based upon a medical examination under Section 3.6(d) (ii) of the Plan, **(Exhibit 7)**, and the follow up examination by the same and exact medical doctor on February 11, 1991, **(Exhibit 8)**, March 26, 1991 **(Exhibit 9)**, Inde-

pendent Medical Examiner ("IME"), by the Mayo Clinic on December 18, 1986, February 28, 1991 **(Exhibit 10)**, January 22, 1992 **(Exhibit 11)**, The Florida Knee Clinic dated February 14, 1991 **(Exhibit 12)**, and the Workers' Compensation decisions awarding the maximum ambulatory award.

67. Section 13.6 (b) protects Plaintiff's ERISA and Plan rights, Defendants violated ERISA in an unlawful and illegal act to pocket, take away and assign to others Plaintiff's vested and earned pension benefits.

68. Plaintiff has met all the provision of the Plan, provided medical documents beyond those required by the Plan, at his own expense.

COUNT II

69. Plaintiff realleges the allegations of Paragraphs 1 through 46 above.

70. Defendant PBGC as a matter of conspiracy with the other Defendants has breached its duty under

ERISA to provide Plaintiff his disability benefit pension, refused to abide by the December 18, 1987 Eastern Medical Department's final and binding medical examination under Section 3.6 of the Plan.

71. The PBGC continues to make new and unreasonable demands on Plaintiff, refuses to submit this matter to the Eastern Medical Department or to select an Independent Medical Examiner under the Plan, refused the disability benefit pension through fraud in claiming that Robert Joy, a non medically trained clerk could turn over medical reports based upon medical examinations by competent and universally recognized authorities.

COUNT III

72. Plaintiff realleges the allegations of Paragraphs 1 through 49 above.

73. Defendants ALPA, Gibson, Tegtman, Copeland, Mogus with others conspired to defraud Plaintiff of

ERISA, Plan and other employee benefits due and payable as of the onset of occupational injury disability on June 15, 1986.

74. Defendants as a matter of conspiracy made false material representations for the purpose to defraud Plaintiff, refused to apply the same standard in providing the ERISA Plan benefits as they have to others, including but not limited to Jack N. Mogus and Robert Shipner.

COUNT IV

75. Plaintiff realleges the allegations of Paragraph 1 through 63 above.

76. Defendant ALPA breached its known duty of legal duties, accept payment for the outstanding union dues and thereby indemnified Plaintiff from any future liability under the RLA union security clause.

77. ALPA had the known legal duty to protect Plaintiff's rights and select a neutral and defend Plaintiff's

rights through arbitration and through the courts.

78. ALBA breached its duty of fair representation owed to Plaintiff as the exclusive bargaining agent under the RLA 45 U.S.C. # 152 et seq.

COUNT V

79. Plaintiff realleges the allegations of Paragraphs 1 through 78 above.

80. Defendants breached their known legal duties, failed to disclose to Plaintiff that the Chairman of the Pension Dispute Board, ("PDB"), was the responsible official of Defendants who discharged Plaintiff on June 17, 1986, a flawed and unlawful discharge which was reversed based upon the denial of Plaintiff's rights to appeal this discharge through arbitration, Defendants actions in omission, material misrepresentation, and fraud.

COUNT VI

81. Plaintiff realleges the allegations of Paragraphs

1 through 80 above.

82. Defendants conspired to bribe the neutral referee selected and employed by Plaintiff to arbitrate the union security clause issue as to Document 102.

83. Defendants bribed the neutral referee.

84. Defendants employee, Martin Soll, on or about August 14, 1986 met with the neutral referee Laurence E. Seibel exparte, solely for the unlawful purpose for the commission of bribe, made an offer of economic value, made statements of material false representations which he wanted to be included in the arbitration decision, he did ask to have the "neutral" make a decision favorable to the Defendants, and in all other means committed an unlawful crime of bribery.

85. Defendants with out right, with out privilege, as a matter of making good on their bribe did pay money, transferred bribery money to the "neutral" Seibel in payment

for a decision favorable to them and their cause, and provided economic value.

86. Defendants provided a list of neutrals to Plaintiff, and had personal knowledge that Seibel was on the "take", that he would and could be used to provide a decision through the offer of economic value, a bribe for official misconduct and a breach of known legal duty.

87. Defendants as a matter of conspiracy, mail and wire fraud carried out the unlawful crime of bribery.

COUNT VII

88. Plaintiff realleges the allegations of Paragraphs 1 through 87 above.

89. Defendants did unlawfully, wilfully and knowingly conspire, combine, confederate, agreed to defraud Plaintiff, impeding, impairing, obstructing, and defeating the lawful government function of the United States and the State of Florida in the lawful government functions to protect

the civil rights of the Plaintiff.

90. Defendants in violation of Section 1983 under the color of law made false material misrepresentations to the Court in the instant cause, committed these unlawful acts through interstate mail and wire fraud.

91. Defendants' employees Gary Green, Felice Busto and Robert Kofman did knowingly, wilfully, intentionally made false material misrepresentations that Mogus and Copeland, officials of Defendant ALPA were arbitrators and immune from prosecution or liability for unlawful acts committed in their actions against Plaintiff.

92. Defendants had personal knowledge, and had known duty of legal duties as officers of the court, that Mogus and Copeland did not or could not function as arbitrators since they had a vested interest in the Defendant Plan, they were official of Defendant ALPA, they were paid by Defendant ALPA, they did not break a deadlock, they had

a conflict of interest in the instant cause involving the union security clause.

COUNT VIII

93. Plaintiff realleges the allegations of Paragraphs 1 through 92 above.

94. Gibson, Tegtman, Mogus and Copeland had personal knowledge that as members of the Pension Dispute Board, PDB as fiduciaries, they had a conflict of interest, could not decide Plaintiff's rights under ERISA and the Plan, based upon the documented conflict of interest.

95. Gibson, Tegtman, Mogus and Copeland had the known legal duty as members of the PDB to recuse and disqualify themselves based upon conflict of interest.

96. Gibson, Tegtman, Mogus and Copeland did unlawfully, wilfully and knowingly conspire to defraud Plaintiff in violation of ERISA 511 of Plan benefits, imped-ed, impaired, obstructed and defeated the lawful function of

the Pension Dispute Board as established under the laws of the Untied States.

97. Gibson, Tegtman, Mogus and Copeland used interstate wire and mail to defraud Plaintiff.

COUNT IX

98. Plaintiff realleges the allegations of Paragraphs 1 through 97 above.

99. Defendants did unlawfully, wilfully and knowingly conspires, combine, confederate and agree to defraud Plaintiff by impeding, impairing, obstructing and defeating the lawful government function of the Railway Labor Act, a law of the United States to promote industrial administration of employee rights in interstate commerce.

100. Defendants used mail and wire in violation of this Count in the fraud committed against Plaintiff.

COUNT X

101. Plaintiff realleges the allegations of Paragraphs

1 through 100 above.

102. Defendants with out right, privilege or excuse failed to allow Plaintiff medical treatment as of his occupational injury on June 15, 1986.

103. Unknown to Plaintiff on June 16, 1986, Defendants had formed an enterprise for the purpose of continuing an unlawful pattern of racketeering, had Defendant Gibson, a corporate officer of Eastern and a member of the Pension Dispute Board, in a covert act was planning to discharge Plaintiff's employment to interfere with Plaintiff's attained ERISA and Plan rights based upon his occupation disability injury on June 15, 1986.

104. Defendants continued to harm, injure Plaintiff, did unlawfully, wilfully and knowingly conspire, combine, confederate and agree to defraud Plaintiff through the refusal to provide him the protection of Section 3.6 of the Plan, to allow the Eastern Airlines Medical Department to examine

Plaintiff and give a medical opinion as to his qualifications for the disability benefit pension.

105. Defendants used interstate wire and mail in this Count.

COUNT XI

106. Plaintiff realleges the allegations of Paragraphs 1 through 105 above.

107. Plaintiff appealed to the United States Department of Labor, Pension and Welfare Benefits Administration (USDOL) for the protection of his ERISA rights, resulting in the November 9, 1987 letter to the Pension Dispute Board (Exhibit 13) and the November 30, 1987 letter to the Board of Trustees (Exhibit 14).

108. USDOL demanded that Plaintiff be examined by the Eastern Medical Department, and that a response reach the USDOL by December 18, 1987

109. Defendants allowed Plaintiff to be examined

by the Eastern Medical Department on December 18, 1987.

110. Defendants with out privilege or excusable right removed said medical report from the Eastern Medical Department and hid and in other means denied Plaintiff's rights under the Plan and ERISA, as a matter of violating ERISA Section 511.

111. Defendants did unlawfully, wilfully and knowingly conspire, combine, confederate and agree to defraud the Plaintiff by impeding, impairing, obstructing, and defeating the lawful government actions of the Department of Labor, a Department of the United States responsible for the administration and enforcement of the Employee Retirement Income Security Act of 1974 (ERISA).

112. Defendants committed the unlawful acts complained of through the use of interstate wire and mail

COUNT XII

113. Defendant Travelers Insurance Company had

received a copy of the Eastern Airlines Medical, dated December 18, 1987 on December 28, 1987 (Exhibit 7), hid said document, refused to provide same to the Workers' Compensation Board, State of New York, ("WCB"), when ordered by the WCB Law Judge on April 11, 1988, at which time Travelers was represented, directed the carrier to produce all medical evidence from employer's (Eastern's) clinic referable to Plaintiff, Travelers has said medical but refused to comply and provide it to the WCB, Plaintiff realleges allegations in Paragraphs 1-112.

114. On January 6, 1989 the WCB Law Judge again ordered Travelers to produce said medical report, again Defendant Travelers refused to comply with the direct order from the WCB.

115. Defendants did unlawfully, wilfully and knowingly conspire, combine, confederate and agree to defraud Plaintiff by impeding, impairing, obstructing, and defeating

the lawful government functions of the Workers' Compensation Board, State of New York in providing protection, compensation for the injury suffered by Plaintiff in his employment.

116. Defendants committed fraud upon the WCB and the Plaintiff through omission and false material misrepresentations.

117. Defendants used interstate wire and mail in this Count.

COUNT XIII

118. Plaintiff realleges the allegations in Paragraphs 1 through 117 above.

119. Defendants removed and subsequently failed and refused to provide the Pension Benefit Guaranty Corporation, ("PBGC"), the December 18, 1987 Eastern Medical Report which certified Plaintiff's disability under Section 3.6 of the Plan, as to his eligibility and qualifications as to the

disability benefit pension.

120. Defendant used this unlawful act to deny and to refuse Plaintiff's ERISA and Plan rights, and to date Plaintiff has not received any money or dispensation of any benefit under the provisions of the Plan.

121. Defendants through interstate mail and wire have unlawfully, wilfully and knowingly conspire, combine, confederate and agree to defraud Plaintiff by impeding, impairing, obstructing, and defeating the lawful government functions of the Pension Benefit Guaranty Corporation, a government corporation incorporated under ERISA, and had an obligation to pay from available Plan assets Plaintiff's liability under the Plan that was due prior to the termination of the Plan on or about October 5, 1990, because the PBGC became trustee of the Plan, and Plaintiff's vested and earned disability became due and payable as of the June 15, 1986.

122. There were sufficient funds to pay Plaintiff.

COUNT XIV

123. Plaintiff realleges the allegations of Paragraphs 1 through 122 above.

124. Defendant William R. Tegtman ("Tegtman"), represented by attorney of record, Maurice Baumgarten met with Plaintiff on or about May 2, 1991 at the Causeway Hotel, Miami, Florida and provided, but not limited to, the following documents:

(a). EMPLOYEE RECORD CHANGE NOTICE, the termination notice of Plaintiff's employment dated 7-7-86, back dated as effective 06-17-86, as approved by A.C. Gibson, V.P. Pilot Relations/Adm. Eastern Airlines, Inc. and the Chairman and member of Defendant Pension Dispute Board. (Exhibit 15).

(b). Letters dated December 1, 1986 in which Defendants unlawfully stated: "will fight it as far as we have to", disclosing the ongoing conspiracy to defeat

Plaintiff's WCB and ERISA rights through unlawful means, (Exhibit 16), and the December 11, 1986 letter in which Defendants sent by interstate mail continued the unlawful activity to defraud Plaintiff made the material misstatement of fact: "Captain Gellert was terminated on June 17, 1986" (Exhibit 17) which was a material false statement of fact, a legal fact known or should have been known to Defendants.

125. These are acts are by design reckless and intent in causing injury, and did injure Plaintiff.

126. On or about October 9, 1991 Gibson testified under oath before the WCB, New York that he discharged Plaintiff.

COUNT XV

127. Plaintiff realleges the allegations of Paragraphs 1 through 126 above.

128. Plaintiff was informed by Defendants that his ERISA pension rights would be lost is he failed to return to

Eastern as an employee during a strike by ALPA pilots.

129. Plaintiff informed Defendants that he was failed by the Eastern Medical Department on December 18, 1987, and that a new medical examination was required by Eastern.

130. Plaintiff did report to Eastern for employment, he considered himself back on the payroll as a Captain simulator instructor, a position that Plaintiff was able to perform.

131. Defendant ALPA responded to Plaintiff on April 6, 1989, (Exhibit 18), and informed Plaintiff that any interference with ERISA benefits would be unlawful, but ALPA would not protect Plaintiff's ERISA pension rights.

132. Defendants informed Plaintiff on January 15, 1991 that Gibson directed Eastern not to rehire Plaintiff, and violated Plaintiff's rights under law as a disabled applicant, and violated Plaintiff's civil rights, Constitutional rights under Section 1983.

133. Plaintiff again found his retirement benefits under ERISA and the Plan placed outside reason, law and denied on factors beyond the Plan's borders.

134. Defendant Gibson's violated Plaintiff's civil rights by a directive that Plaintiff was not eligible to be rehired.

COUNT XVI

135. Plaintiff realleges the allegations of Paragraphs 1 through 134 above.

136. Plaintiff contacted Defendant ALPA, through its general counsel Gary Green on January 27, 1992, during a break in the instant cause of action, and demanded assistance, legal representation under the duty of fair representation.

137. ALPA denied representation while admitting a duty as the exclusive bargaining agent for all Eastern pilots, but expressed an intent to defeat Plaintiff's ERISA claims.

138. ALPA has a duty to provide fair and impartial consideration of the interest of all pilot employees, ALPA as the exclusive bargaining agent as such, has the duty to exercise the power in their interest and behalf, akin to the duty owed by other fiduciaries paralleling the responsibilities of corporate officers, trustees, attorneys, a duty of care as well as a duty of loyalty, the duty to represent the Plaintiff honestly and in good faith. ALPA refused the duty required.

139. ALPA's action is a breach of duty, ("DFR") an actionable breach.

COUNT XVI

140. Plaintiff realleges the allegations of Paragraphs 1 through 139 above.

141. ALPA has paid for attorneys and in all manner consistent has provided legal representation to defraud Plaintiff of ERISA Plan benefits and other earned and vested employee rights as a matter of conspiracy and to intentional-

ly breach its known legal duty to Plaintiff.

142. Gary Green and Felice Busto were the two ALPA attorneys who successfully discharged Plaintiff's employment, and have successfully denied Plaintiff's ERISA Plan, and have become the attorneys of record in this cause.

143. Defendant ALPA's activity in the engagement of legal representation to take away, deny and to defraud Plaintiff's ERISA Plan rights is interference, a legal landscape in this specific time, it is behavior so far outside a wide range of reasonableness as to be irrational.

144. Defendant ALPA used interstate wire and mail to defraud Plaintiff, without justifiable excuse, lacking any right privilege and committed these acts in a willful and deliberate manner.

COUNT XVII

145. Plaintiff realleges the allegations and Paragraphs 1 through 144 above.

146. Defendants in a conspiracy to defraud Plaintiff of ERISA, Plan and other earned benefits in a clear and intentional violation of Section 510 of ERISA # 1140 discharged Plaintiff's employment on June 17, 1986 for the purposes with the attainment to the disability benefit pension to which he became entitled to on June 15, 1986.

147. When the June 15, 1986 discharge was reversed, October 17, 1986, was used as a new discharge date.

148. Defendants action of denial of Plaintiff's ERISA and Plan rights as attained on June 15, 1986 based upon a subsequent discharge on October 17, 1986, some four months later, is a prima facie case in violation of Section 510.

149. Defendants used interstate wire and mail in the commission of acts complained of.

COUNT XVIII

150. Plaintiff realleges the allegations and Para-

graphs 1 through 149 above.

151. Defendants defrauded Plaintiff of ERISA and Plan benefits and rights as a matter of conspiracy in an intentional and deliberate violation of Section 511 of ERISA # 1141, continue to restrain, intimidate to interfere with the exercise of rights to the disability benefit pension.

152. Defendants used interstate wire and mail in the commission of the criminal acts complained of in this action.

153. Defendants did unlawfully, wilfully and knowingly conspire, combine, confederate and agree to defraud Plaintiff by impeding, impairing, obstructing and defeating the lawful functions of Plaintiff rights to the attainment of ERISA and Plan benefits, Defendants continue to restrain, intimidate and interfere with the exercise of those ERISA rights and benefits.

154. Defendants by trick, scheme and in other unlawful means moved against Plaintiff's ERISA rights, and

claiming immunity under the RLA preemption as a matter of fraud.

COUNT XIX

155. Plaintiff realleges the allegations and Paragraphs 1 through 154 above.

156. Defendants have not provided Plaintiff all the information and documents as requested in the December 28, 1989 letter, notwithstanding the fact that it did, in April 1990, provide some of the information.

157. Defendants have since December 1985 to date failed and refused to provide information as to documentation of Plaintiff's retirement benefits and options.

158. Plaintiff has requested this information and the failure to provide this documentation has prejudiced his case since he is unaware of his retirement benefits and options.

159. Defendants' failure to provide this information as requested within 30 days is in violation of Section 502 of

ERISA 29 U.S.C. # 1132.

160. Actions complained of were through the use of interstate wire and mail.

COUNT XX

161. Plaintiff realleges the allegations and Paragraphs 1 through 160 above.

162. Defendants did unlawfully, wilfully and knowingly conspire, combine, confederate and agree to deny Plaintiffs rights as secured by the Constitution and laws of the United States for injury under the color of law by impeding, impairing, obstructing and defeating the lawful government functions

(a) First Amendment, Defendants denied Plaintiff's right to free speech through the forced collection of union dues, forcing an unlawful ideological conformity of which Plaintiff complained of.

(b) Fifth Amendment, Defendants violated Plain-

tiff's right to due process, conspired to defraud Plaintiff of property, failed to provide a fair hearing through the bribery of the neutral, through the use of Gibson as a fiduciary under ERISA, nd through fraud in claiming the privilege of immunity under the RLA reemption from suit for compensation and damages.

(c) Seventh Amendment, Defendants have committed torts and wrongs at common law, and have denied Plaintiff's right to a jury trial through fraud in claiming immunity.

163. Defendants have violated 42 U.S.C. Section 1983 when under the color of law taken Plaintiff's property as to pension and other earned and vested employee benefits, employment, refused to rehire him, defamed, injured him through interference with contractual rights without corresponding interest or right.

164. The acts complained of were committed

through interstate wire and mail.

COUNT XXI

165. Plaintiff realleges the allegations and Paragraphs 1 through 164 above.

166. Defendants through the actions of this complaint did violate RICO, through the existence of an enterprise and a pattern of racketeering committing more then two predicate crimes, acts of racketeering within the past ten years, these acts were connected by a common scheme, plan an motive, constituting an unlawful pattern.

167. 18 U.S.C. # 1962(c) in essence prohibits persons from forming or joining an interstate concern and conducting or participating in the concern's affairs through the means of organized, concerted criminal activity in defrauding the United States, the passengers of Eastern and the Plaintiff.

168. The action complained of is based upon an

indictment consisting of some sixty (60) Counts by a federal grand jury, and a plea agreement consisting of admissions of guilt to more then eight (8) Counts by more then one defendant.

169. The action complained of resulted in a number of violations by the Federal Aviation Administrations of the Department of Transportation against defendants.

170. The action complained of documents a violation of Section 511 ERISA # 1141, a criminal statute.

171. The action complained of documents a count of bribe, a felony criminal violation.

172. The action complained of had as an element over twenty (20) acts of interstate wire and fail fraud.

173. The action complained of has alleged over twenty (20) acts of conspiracy.

174. This complaint alleges over two predicate crimes.

175. The acts complained of are economic crimes of extortion, demanding payments of money through inter-state mail and wire of money not owed, a legal fact known to all Defendants. Retaliation against Plaintiff when he complained and resisted the ongoing extortion.

176. The acts complained of are labor and union violations of federal law.

177. The acts complained of are in retaliation of Plaintiff's duty under Federal Air Regulations, and made him a victim under RICO.

178. Defendants "associated in fact" at least as early as July 24, 1985 to form an "enterprise" that effects interstate commerce as defined by 18 U.S.C. # 1961(4). This enterprise has functioned formally and informally since that time to this day, as a continuing unit, with common purpose of engaging in a massive, concerted, illegal effort to force Plaintiff to pay money which he did not owe, had no

legal obligation to pay, then to take a less amount under the ERISA Plan then what was due and payable under law. This action is economic extortion.

178. All Defendants are "persons" as defined by 18 U.S.C. # 1961(3). Defendants associated themselves with the enterprise described above and conducted or participated in the conduct of the enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. # 1962(c).

179. Specifically, Defendants knowingly, willfully and unlawfully devised and executed an illegal scheme carried out through their use of the enterprise in an illegal effort to extort money which was not owed, falsified union dues records, Defendants' economic extortion was to force Plaintiff unlawfully to relinquish his claim under ERISA, the Plan and contract for self gain, retaliate against Plaintiff for his refusal to violate Federal Regulations and join the ongoing conspiracy to defraud the United States and the passengers

of Eastern. Although Defendants have not fully accomplished their goal of their illegal scheme to date, they have discharged Plaintiff's employment, denied Plaintiff's ERISA Plan funds for over five and a half (5 1/2) years, pocketed money for self gain, violated Plaintiff's rights under the First, Fifth and Seventh Amendments, Federal Air Regulations, they have severely injured Plaintiff in pursuit of their scheme by means of numerous false and fraudulent statements transmitted through the interstate mails and wire, extortion and through the commission of numerous other criminal acts.

180. The illegal acts described above in Paragraphs 1-179 above constitute "racketeering activity" as defined by 18 U.S.C. # 1961(1). That racketeering activity was related and continuous and defendants threaten to continue that unlawful activity in the future in pursuit of their illegal scheme. This activity constitutes a "pattern of racketeering activity"

as set forth in 18 U.S.C. # 1961(5).

181. By reason of defendants violation of 18 U.S.C. # 1962(c) Plaintiff has suffered injury in his earned and vested ERISA, Plan and contractual rights, property and personal life and reputation.

COUNT XXII

182. Florida "Civil Remedies for Criminal Practices Act", Fla. Stat. # 772.101 et seq. sets forth "prohibited activities" under the Act at Fla. Stat. # 772.103. Section 772.103(3) makes it unlawful, inter alia, for any person associated with an enterprise to conduct or participate in such enterprise through a pattern of criminal activity. Section 772.103(3) in essence prohibits persons from forming or joining a concern and conducting or participating in the conduct of the concern's affairs through the means of organized, concerted criminal activity.

183. Defendants "associated in fact", at least as

early as of July 24, 1985, to form an "enterprise" as defined by Florida Statute # 772.102(3). This enterprise, which has conducted a substantial portion of its activities in Florida, has functioned formally and informally since the time to date, as a continuing unit with the common purpose of engaging in a massive, concerted illegal effort to force Plaintiff to pay, and in other means relinquish great sums of money, in order for the Defendants to gain an economic advantage and pocket great sums of Plaintiff's money.

184. Defendants associated themselves with the enterprise and conducted and participated in the conduct of enterprise through a pattern of criminal activity in violation of # 772.103(3).

185. Specifically, Defendants knowingly, willfully, and unlawfully devised and executed an illegal scheme, carried out in substantial part in Florida through their use of the enterprise in an illegal effort to force the Plaintiff to

relinquish his rights of property, pay sums of money in violation of Florida Statutes, so that Defendants can acquire same for themselves. Although Defendants have not fully accomplished the goal of their illegal scheme to date, Defendants have benefited, received economic advantage, pocketed money, and have severely injured Plaintiff in pursuit of their scheme by means of numerous false and fraudulent statements transmitted interstate mail and wires, committed extortion, bribery and through commission of numerous other criminal acts.

186. The illegal acts described in Paragraphs 1 through 185 above, constitute "criminal activity" as defined by Fla. Stat. # 772.102(1)(a)(22) and (b). As set forth above, Defendants have engaged in numerous different, yet related incidents of continuous criminal activity over more then a six-year period in furtherance of their goal to illegally acquire money and other economic advantage from Plaintiff.

187. This activity constitutes a "pattern of criminal activity" as defined by Fla. Stat. 772.103(3).

188. Plaintiff has been injured by reason of Defendants' violation of Fla. Stat. # 772.103(3).

189. Plaintiff realleges the allegations of Paragraphs 1 through 188 and Counts I through XXII in any order above.

190. Defendants through their actions have defamed, and have interfered with Plaintiff's rights to employment, a matter which is protected by the State of Florida, protected by federal law, and civil rights Equal Employment Statute.

191. Defendants have caused permanent, severe intentional distress to Plaintiff through actions in Paragraphs 1 through 190, Counts I through XXII.

DAMAGES

191. Defendants' unlawful conduct, as described in the foregoing legal counts, has caused actual damages to

Plaintiff, the magnitude of which is enormous. Plaintiff estimates that Defendants actions in misconduct has caused actual damages of $1,000,000.00, to date, if unlawful activities continue then these damages will increase.

PUNITIVE DAMAGES

192. Defendants' disparagement of property, defamation, tortious interference with contractual rights, ERISA Plan rights, interference with Plaintiff's rights to employment, business advantage, investments, conspiracy to induce breaches of fiduciary duty, bribery, fraud, breaches of known legal duty and all other actions described in Paragraphs 1 through 191 herein, were committed knowingly and intentionally for the purpose of injuring Plaintiff. Consequently, Plaintiff is entitled to recover from Defendants punitive damages, which Plaintiff claims in an amount no less then 5 million dollars.

WHEREFORE, Plaintiff prays for judgment as

follows:

(a) an award to Plaintiff of such damages as he shall prove at trial in an amount no less then $3,000,000.00 trebled as mandated by 18 U.S.C. # 1964(c) and Florida Statute # 772.104

(b) an award of punitive damages to Plaintiff in an amount no less then 5 million dollars;

(c) an award to Plaintiff for cost of this action, together with attorney fees pursuant to RICO;

(d) judgment under ERISA based upon Sections 510 & 511;

(e) award to Plaintiff any such different or further relief under ERISA this Court deem just and proper;

(f) payment of legal fees as authorized under ERISA;

(g) legal representation by ALPA under the duty of fair rescntation;

(h) award $100.00 per day from January 1986 to date of judgment for violation of 502 ERISA 29 U.S.C. # 1132;

(i) an award to Plaintiff both pre-judgment and post-judgment interest on their actual damages, at the highest interest rate permitted by law;

(j) an award to plaintiff any such different or further relief this Court may deem just and proper.

PLAINTIFF DEMAND THAT THIS ACTION BE TRIED BY JURY.

/s/ DANIEL GONZALES GELLERT, pro se

February 23, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 90-1113-CIV-MORENO

DANIEL G. GELLERT,

Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, et. al.,

Defendants.

DEFENDANT TRAVELERS INSURANCE COMPANY'S MOTIONS TO DISMISS AND STRIKE AND MEMORANDUM IN SUPPORT

Defendant, The Travelers Insurance Company ("Travelers"), pursuant to the Federal Rules of Civil Procedure, respectfully moves this Court to:

1. dismiss the Plaintiff's third and proposed fourth amended complaints pursuant to Rules 12(e) and 41(b)

for violating a previous court order; or in the alternative,

2. strike the Plaintiff's complaints pursuant to Rules 8(a) and 12(f) for being verbose, rambling, immaterial and impertinent; or in the alternative,

3. dismiss or strike the Plaintiff's complaints pursuant to Rules 8(a) an 12(e) for being so vague and ambiguous so as to not permit Travelers to frame a responsive pleading,

4. dismiss all counts in the Plaintiff's complaints pertaining to Travelers pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

BACKGROUND

This action was commenced when Plaintiff filed a two-count complaint on May 9, 1990 against various Defendants (not including Travelers) to recover retirement and pension benefits allegedly owing to him. An amended complaint generally setting forth the same two counts was filed

on May 29, 1990. In an order filed September 6, 1991, this Court dismissed count I with prejudice on grounds that the Plaintiff's claim was time barred by the statute of limitations under the Railway Labor Act (RLA), 45 USC §153(first)(r). This Court held that the complaint only challenged the Pension Dispute Board's findings and was not based on a breach of fiduciary duty, and accordingly the longer ERISA statute of limitations had no application. This Court also granted individual Defendants Mogus and Copeland's motions to dismiss on the separate ground that they could not be found personally liable.

Plaintiff, acting pro se, then filed a 10-count first amended complaint against numerous Defendants [Travelers was named as a Defendant but was never served or notified of the action] on January 30, 1992, alleging claims under RICO, 18 USC §1961 et seq.; ERISA, 29 USC 1132 et seq.; 42 USC §1983; statutory and common law of Florida, and

under the laws of Workers' Compensation Board. In an Order dated February 13, 1992, this Court struck Plaintiff's first amended complaint sua sponte because it "included Counts and named Defendants which were previously dismissed pursuant to this Court's Memorandum Opinion" of September 6, 1991. This Court granted Plaintiff 20 days leave to amend the complaint and ordered that the amended complaint "SHALL NOT include reference to any Counts or any Defendants previously dismissed by Order of this Court" (emphasis in original).

Contrary to the express terms of this Court's order, Plaintiff filed a third and proposed fourth amended complaint against various Defendants [Travelers was served for the first time] alleging virtually the same causes of action contained in the first amended complaint struck by this Court.[1]

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[1] Plaintiff actually filed a second amended complaint prior to this Court's sua sponte dismissal, which complaint also improperly contained the same causes of actions and

Furthermore, the additional counts and arguments contained in the third and fourth amended complaints (each of which spans 38 pages) are so intertwined, verbose, immaterial and confusing that it is impossible to ascertain with a reasonable degree of certainty what allegations are made and against which Defendants. While it appears that only Count XII is directed against Defendant-Travelers (wherein Travelers, the worker's compensation carrier of Plaintiff's former employer, Eastern Airlines, is alleged to have violated an administrative law judge's discovery order in a New York state worker's compensation proceeding), Plaintiff generically refers to "Defendants" in nearly every other count.

MEMORANDUM OF LAW

1. Motion to Dismiss for Violation of Court Order pursuant to Rules 12(e) and 41(b)

The Plaintiff's continuing failure to comply with this

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defendants.

Court's order of February 13, 1992, calls for the dismissal with prejudice of the third and proposed fourth amended complaints. Federal district courts, pursuant to Rules 12(e) and 41(b), have repeatedly dismissed complaints for a plaintiff's failure to timely file an amended complaint in conformity with a previous court order. E.g., Agnew v. Moody, 330 F.2d 868, 870-71 (9th Cir.), cert. denied, 379 U.S. 867 (1964) (upholding Rule 41(b) dismissal of complaint after 2 1/2 months passed beyond 20 days allowed by court order to amend verbose complaint which violated Rule 8(a)'s "short and plain statement" requirement); Hall v. Killingsworth, 253 F.2d 43, 43 (D.C. Cir. 1958) (upholding dismissal of complaint after 2 months passed beyond 20 days allowed by court order to file more specific and definite complaint).

In Echols v. Voisine, 506 F.Supp. 15 (E.D. Mich. 1981), aff'd, 701 F.2d 176 (6th Cir. 1982), for example, while recognizing that a burden is placed on a pro se plain-

tiff to properly draft an extensive conspiracy complaint, the court stated that it "cannot lose sight of the fact that the primary purpose of procedural rules is 'to promote the ends of justice,'" id. at 17, and accordingly dismissed the plaintiff's complaint with prejudice for continually failing to comply with a court order to file a comprehensible pleading. Id. at 16-19.

In the present action, the Plaintiff has openly ignored this Court's prior order which set forth in underlined bold print that no reference be made to any previously counts. Over 3 1/2 months have passed since this Court's order allowing Plaintiff 20 days to properly amend his pleadings. Although Plaintiff is a pro se complainant, his continual flaunting of this Court's authority requires the harsh sanction of dismissal with prejudice.

2. Motion to Strike for being Verbose, Rambling, Immaterial and Impertinent pursuant to Rules 8(a) and 12(f)

In the alternative, this Court should strike Plaintiff's third and proposed fourth amended complaints pursuant to Rules 8(a) and 12(f) for being unduly verbose, rambling, immaterial and impertinent. The Plaintiff's 38-page pleading is a "labyrinth of unwarranted, scandalous and vituperative allegations" which in no way conforms to Rule 8(a)'s "short and plaint statement" requirement and accordingly should be struck. See Prezzi v. Berzak, 57 F.R.D. 149, 150-51 (S.D. N.Y. 1972) (pro se plaintiff's complaint struck for needlessly rambling, speculating, accusing and condemning); see also Newman v. Commonwealth of Massachusetts, 115 F.R.D. 341 (D.Mass. 1987) (striking plaintiff's complaint for violation of Rule 8(a)'s "plain and simple statement" requirement).

3. Motion For More Definite Statement pursuant to Rules 8(a) and 12(e) for being Vague

and Ambiguous .

In the alternative, this Court should at the very least dismiss or strike Plaintiff's third and proposed fourth amended complaints pursuant to Rules 8(a) and 12(e) because they beyond question are "so vague or ambiguous that [Travelers] cannot reasonably be required to frame a responsive pleading." Rule 12(e); see also Federal Deposit Ins. Corp. v. Wise, 758 F.Supp. 1414, 1418 (D.Colo. 1991); American Sheet Metal, Inc. v. Em-Kay Engineering Co., Inc., 478 F.Supp. 809, 814-15 (E.D. Cal. 1979) (vague and ambiguous pleadings subject to Rule 12(e) where adverse party cannot ascertain true nature of issues he must meet).

Due to the incredibly confusing, redundant and verbose nature of Plaintiff's 38-page complaint, Travelers cannot properly determine which causes of actions are being pled and against which Defendants they are aimed. While it would appear that the only potentially relevant allegations

leveled against Defendant-Travelers are found in Count XII, Plaintiff generally refers to the "Defendants" in nearly every count. It is accordingly impossible to frame an intelligent response to this document, especially since it contains claims which were previously dismissed by this Court in addition to new incomprehensible allegations.

4. Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted pursuant to Rule 12(b)(6)

In the alternative, Travelers should be dismissed from this action pursuant to Rule 12(b)(6) because the Plaintiff's third and proposed fourth amended complaints do not set forth any cognizable cause of action against it.

Again, it appears that only Count XII is directly aimed at Travelers. Plaintiff states that Travelers is the worker's compensation carrier for Plaintiff's former employer, Eastern Airlines. See Plaintiff's third and proposed fourth amended complaints at ¶14. He alleges in Count XII

that Travelers, in an administrative proceeding before the Workers' Compensation Board of the State of New York, failed to comply with a law judge's order of April 11, 1988, directing Travelers to produce all relevant medical evidence from his employer's (Eastern's) medical clinic. Id. at ¶113.

Plaintiff further alleges that Travelers was hiding a copy of the "Eastern Airlines Medical, dated December 18, 1987" and that the law judge again ordered Travelers to produce the medical report by Travelers refused. Id. at ¶¶ 113-14. From these actions, the Plaintiff then states that "Defendants" conspired to defraud him by obstructing the Board's provision of compensation and that the "Defendants" committed fraud. Id. at ¶¶ 115-16. "Defendants" are also said to have used interstate wire and mail in this count. Id. at ¶117.

Even taking the factual allegations set forth in Count XII as true, Plaintiff has not stated any claim against Travel-

ers upon which relief can be granted for at least two reasons. First, the complaints are infirm as a matter of law because Plaintiff has failed to allege how he was damaged or injured by Travelers' actions. Whether Plaintiff proceeds under RICO (18 USC §§ 1961 et seq.) or state statutory (Fla. Stat. §772.104 - Florida RICO) or common law theories based on conspiracy or fraud, it is essential to each of these theories that the Plaintiff set forth facts showing how he was damaged by the Defendant's action.[2]

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[2] See O'Rear v. American Family Life Assur. Co., 139 F.R.D. 418, 421-22 (M.D. Fla. 1991) (complaints alleging fraud and RICO dismissed for failing to state how Plaintiff was damaged and how Defendant's actions caused those damages); Bozcar v. Manatee Hospitals & Health Systems, Inc., 731 F.Supp. 1042, 1047 (M.D. Fla. 1990) (complaint alleging RICO dismissed for failure to state a claim where no facts were alleged demonstrating injury flowing from Defendant's misconduct); Ouaknin v. MacFarlane, 897 F.2d 75, 82-83 (2d Cir. 1990) (same); Shearin v. E.F. Hutton Group,Inc., 885 F.2d 1162, 1167-68 (3d Cir. 1989) (same); §772.104 (Plaintiff must show he was "injured" by Defendant's criminal misconduct under Florida RICO act); Tippett v. Frank, 238 So.2d 671, 673 (Fla. 3d DCA 1970) (common law fraud claim legally insufficient where no facts alleged

Here, the complaints are devoid of any factual allegations showing how the Plaintiff was injured or damaged as a result of Travelers' alleged withholding of a discovery document. To the contrary, Plaintiff openly concedes in his complaints that he received "the maximum ambulatory award" as a result of the workers' compensation decisions. See Complaints at ¶66. Plaintiff has admitted, therefore, that he suffered no injury or harm as a result of any alleged actions by Travelers. Actual harm, an essential element of all Plaintiff's putative claims, is missing and accordingly Travelers must be dismissed from the action.[3]

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showing injury resulted from misconduct); National Equipment Rental, Ltd. v. Little Italy Restaurant & Delicatessen, Inc., 362 So.2d 338 (Fla. 4th DCA 1978) (actual damages are essential element of fraud claim); Ocala Loan Co. v. Smith, 155 So.2d 711, 716 (Fla. 1st DCA 1963) (complaint alleging conspiracy must set forth facts showing damage).

[3] Plaintiff's claims against Travelers should, furthermore, be dismissed with prejudice. This Court should take judicial notice of the Workers' Compensation Board Decision which Plaintiff filed as Exhibit Four to his first complaint.

Second, the complaints are deficient because any alleged misconduct on the part of Travelers for withholding a discoverable document in an administrative proceeding simply is not redressable in a separate legal action. Plaintiff was adequately protected by the rules and remedies provided for the resolution of discovery disputes in a New York state workers' compensation proceeding.[4] Plaintiff's attempt to

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The Board affirmed the law judge's decision to award the Plaintiff compensation at a rate of $150.00 reduced earnings. It was exactly because Travelers did not produce any reports from an examining physician of employer-Eastern Airlines that the Board concluded there was no contrary evidence to overturn the law judge's award. The Board decision against Travelers clearly shows that Plaintiff was not injured or damaged by any alleged document withholding on the part of Travelers. If anything, Travelers' alleged actions assisted the Plaintiff by serving as the basis of the affirmance of the award.

[4] Indeed, the Workers' Compensation Board Decision attached as Exhibit Four to Plaintiff's first complaint states that Plaintiff requested "that a penalty be assessed pursuant to Sect. 25-2(c) Workers' compensation Law," presumably for Travelers' alleged failure to produce the employer's medical records. The Board did not assess any penalty, however, as it held that Travelers' non-production of con-

convert what is at best an administrative discovery problem into a separate RICO, conspiracy of fraud action is unprecedented and unwarranted. Cf. Richmark Corp. v. Timber Falling Consultants, Inc., 730 F.Supp. 1525, 1531-32 (D. Ore. 1990) (no RICO action arises out of Defendant's concealing or withholding discovery in prior civil legal proceeding).

Furthermore, to the extent any or all of the other counts in the third and proposed fourth amended complaints may properly be construed as aimed at Travelers as one of the "Defendants," they clearly do not state a cause of action as there are no other date and time specific factual allegations of misconduct leveled against Travelers. See e.g., Truesdell v. Proctor, M.D., 443 So.2d 107, 108 (Fla. 1st DCA 1983) (where complaint alleges fraud or conspiracy,

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trary medical evidence only served to establish that the law judge's compensation award was not erroneous.

facts constituting Defendant's wrongdoing must be pled with specificity). Plaintiff has not alleged that Travelers in any way connected with his pension benefits or Plan rights. The only specific allegations as to Travelers are those set forth in Count XII, and as demonstrated above, these allegations are woefully deficient and do not give rise to any cognizable legal remedy. Accordingly, Travelers should be dismissed form this action.

WHEREFORE, Defendants Travelers respectfully requests this Court to: dismiss Plaintiff's third and proposed fourth amended complaints with prejudice; or in the alternative, dismiss or strike the complaints with leave to amend.

Respectfully submitted

HICKS, ANDERSON & BLUM, P.A.
New World Tower - Suite 2402
100 North Biscayne Blvd.
Miami, Florida 33132
(305) 374-8171

/s/ MARK HICKS
/s/ GARY A. MAGNARINI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendant Travelers Insurance Company's Motions to Dismiss and Strike and Memorandum in Support was mailed this 28th day of May, 1992 to:

Daniel Gonzales Gellert
P.O. Box 320370
Cocoa Beach, Florida 32931

Mark Blank, Esq.
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, N.W.
Washington, D.C. 20005-4026

Maurice J. Baumgarten, Esq.
Walker, Anania, Bandklayder & Blackwell
Suite 3300 - International Place
100 Southeast Second Street
Miami, Florida 33131

Gary Green
Felice Busto
Air Line Pilots Assn.
1625 Massachusetts Avenue, N.W.
Suite 702
Washington, D.C. 20036

Robert T. Kofman, Esq.
Julie A. Novick, Esq.
Stearns Weaver Miller
150 West Flagler Street
Suite 2200 Museum Tower
Miami, Florida 33130

/s/ GARY A. MAGNARINI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 90-1113-CIV-MORENO

DANIEL G. GELLERT,

Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, et. al.,

Defendants.
_____/

MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS EASTERN AIRLINES PILOTS RETIREMENT BOARD, a/k/a PENSION DISPUTE BOARD, ALAN C. GIBSON, WILLIAM R. TEGTMAN, JACK N. MOGUS, CHARLES COPELAND AND THE TRAVELERS INSURANCE CORPORATION

Plaintiff, DANIEL GONZALES GELLERT, in pro se hereby move this Honorable Court for the entry of summary judgment on Counts III. V. VII. VIII. IX. X. XI. XII.

XIV. XV. XVII. XVIII. XXI. XXII. and Sections 24, 40, 42, 58, 59, 60, 63, against defendants Eastern Airlines Pilots Retirement Board, a/k/a Pension Dispute Board, Alan C. Gibson, William R. Tegtman, Jack N. Mogus, Charles Copeland, and the Travelers Insurance Corporation of the Third Amended Complaint, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and Local Rule 10 J. In support of this motion, plaintiff files herewith memorandum of law, a Declaration of plaintiff Daniel G. Gellert (and supporting exhibits).

Plaintiff demands compensatory damages of $4,000,000.00 (4 million dollars of sum certain), and this sum trebled under RICO as provided pursuant to Counts XXI and XXII, demands $12,000,000.00 (12 million dollars) sum certain.

Dated April 7, 1993.

Respectfully submitted,

/s/_____
DANIEL GONZALES GELLERT pro se
P.O. Box 320370
Cocoa Beach, Florida 32932
(407) 783-9412

VOLUNTARY CHECK-OFF OF ASSOCIATION DUES received by telephonic facsimile from the Air Line Pilots Association's Herdon office, on January 13, 1993, and that this document was in effect from December 1, 1971 to the present, to authorize the deduction of money from any pay received from Eastern Airlines, Inc., for union dues, or any other financial obligations as to the payment of union dues under the Railway Labor Act, Eleventh, union security.

4. I met my responsibility under the Railway Labor Act, 45 U.S.C. 152 Railway Labor Act under the Agreement between Eastern Airlines, Inc. and the Air Line Pilots Association.

5. Defendants A.C. Gibson, W.R. Tegtman, C.H. Copeland J.N. Mogus and Travelers Insurance Corporation committed the acts complained of in the Third Amended Complaint based upon the June 22, 1987 Decision of the Dispute Board. **EXHIBIT B.**, and in the hiding by Travel-

ers Insurance Corporation, ("Travelers") the December 18, 1987 Eastern Airlines Medical, **EXHIBIT C.**, to provide this medical to the New York Workers'. Compensation Board, ("WCB") on demand. **EXHIBIT D.**, and Defendants injured plaintiff through claiming that he did not authorize deduction of his union dues, which are material false statements of fact, fraud committed in conspiracy.

6. Defendants have defamed plaintiff, Travelers sent the attached page from their records to medical doctors during the forced medical evaluations under WCB Law, in which Travelers published statements such as: "Captain Gellert was terminated from Eastern for nonpayment of his union dues ... According to Captain Burke, Captain Griffith, Captain Crane and Martin Soll at Eastern Airlines this claimant has a long history of erratic behavior with the airline ... The claimant has a conviction for nonpayment of income taxes accòrdng to Captain Crane." **EXHIBIT E.**

App. 7

MEMORANDUM OF LAW

Plaintiff files this memorandum of law in support of the entry of summary judgment since no genuine issue of material fact remains in this cause of action, upon which reasonable men or women could differ, and defendants do not have admissible evidence which could be placed before the jury to come to a different conclusion and find for defendants.

Based upon plaintiff's Third Amended Complaint, and Affidavit attached herein, plaintiff has proved conclusively as a matter of law, that plaintiff could not have been discharged from his Eastern Airlines employment for the nonpayment of union dues, since the Air Line Pilots Association had an in effect authorization from the plaintiff for the voluntary deduction of his union dues obligation, from December 1, 1971, at least until January 13, 1993.

Therefore, defendants have no admissible evidence

that may affect the outcome of this suit under the governing substantive law which could properly preclude the entry of summary judgment under Rule 56(c) of the Federal Rules of Civil Procedures. See: ANDERSON v. LIBERTY LOBBY, INC., 477 US 242, CELOTEX CORP. v. CATRETT, 477, US 317.

WHEREFORE, Plaintiff Daniel Gonzales Gellert, move the Court for entry of summary judgment against the Defendants for a sum certain of $12,000,000.00, and Plaintiff demands a jury trial for punitive damages.

Respectfully submitted,

/s/_____
DANIEL GONZALES GELLERT pro se

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this **7th** day of **April, 1993**, to:

Robert Kofman, Esq.
150 West Flagler Street
Suite 2200 Museum Tower
Miami, FL 33130

Mark Blank, Esq.
Pension Benefit Guaranty Corp.
2020 K Street, N.W.
Washington, D.C. 20006

Maurice J. Baumgarten, Esq.
Eastern Airlines, Inc.
Miami International Airport
Miami, Florida 33148

Mark Hicks, Esq.
Suite 2402 New World Tower
100 N. Biscayne Blvd.
Miami, FL 33132

/s/_____
DANIEL GONZALES GELLERT pro se
P.O. Box 320370
Cocoa Beach, Florida 32932
(407) 783-9412

AFFIDAVIT
(DECLARATION)

BREVARD COUNTY)
) SS
STATE OF FLORIDA)

BEFORE ME THE undersigned authority personally appeared, DANIEL GONZALES GELLERT, who after being duly sworn, deposes and states the following:

1. I am the plaintiff in Court Case No. 90-1113-CIV-MOORE, in which, Eastern Airlines Pilots Reitrement Board, a/k/a, Pension Dispute Board, Alan C. Gibson, William R. Tegtman, Jack N. Mogus, Charles Copeland and the Travelers Insurance Corporation are defendants.

2. I have personal knowledge of the following facts:

3. EXHIBIT A, is a true and correct copy of my Affidavit executed on the 16th Day of January, 1993, and EXHIBIT 1., attached to that Affidavit is a true and correct copy of the ASSIGNMENT AND AUTHORIZATION FOR

7. Defendant Gibson was the Eastern Airlines official who discharged plaintiff's employment after plaintiff's occupational injury, **EXHIBIT F.**, and following this, Gibson with the other defendants denied plaintiff's earned and vested benefits as a fiduciary under ERISA.

FURTHER AFFIANT SAYETH NOT.

/s/_____
DANIEL GONZALES GELLERT

SWORN TO AND SUBSCRIBED before me this 3rd day of March, 1993.

/s/Donna Christensen
NOTARY PUBLIC
STATE OF FLORIDA AT LARGE

COMM # CC 122056

MY COMMISSON EXPIRES: 6-27-95

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI, FLORIDA

CASE NO.: 90-1113-CIV-MORENO

DANIEL G. GELLERT,

Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS and employee benefit pension plan, and EASTERN AIRLINES, INC., solely as Administrator of such defendant plan, PENSION BENEFIT GUARANTY CORPORATION, AIR LINE PILOTS ASSOCIATION, EASTERN AIRLINES PILOTS RETIREMENT BOARD a/k/a PENSION DISPUTE BOARD, ALAN C. GIBSON, WILLIAM R. TEGTMAN, JACK N. MOGUS, CHARLES COPELAND and THE TRAVELERS INSURANCE CORPORATION,

Defendants.
_____/

DEFENDANT TRAVELER INSURANCE COMPANY'S MOTION TO STRIKE OR STAY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, TO EXTEND THE TIME TO RESPOND

Defendant Travelers Insurance Company files this motion to strike or stay Plaintiff's motion for summary judgment pending resolution of outstanding motions to strike or dismiss the third amended complaint. In the event the relief sought is denied, Travelers respectfully requests a 90-day extension of time from the date of the Clerk's entry of such Order to conduct discovery and to respond to Plaintiff's motion.

As grounds for its motion, Travelers states:

Background

This action was commenced when Plaintiff filed a two-count complaint on May 9, 1990 against various defendants (not including Travelers) to recover retirement and pension benefits allegedly owing to him. An amended com-

plaint generally setting forth the same two counts was filed on May 29, 1990. In an order filed September 6, 1991, this Court dismissed count I with prejudice on grounds that the Plaintiff's claim was time barred by the statute of limitations under the Railway Labor Act (RLA), 45 USC §153(first)(r). This Court held that the complaint only challenged the Pension Dispute Board's findings and was not based on a breach of fiduciary duty, and accordingly the longer ERISA statute of limitations had no application. This Court also granted individual Defendants Mogus' and Copeland's motions to dismiss on the separate ground that they could not be found personally liable.

Plaintiff, acting pro se, then filed a 10-count first amended complaint against numerous Defendants [Travelers was named as a Defendant but was never served or notified of the action] on January 30, 1992, alleging claims under RICO, 18 USC §1961 et seq.; ERISA, 29 USC 1132 et seq.;

42 USC §1983; statutory and common law of Florida, and under the laws of Workers' Compensation Board. In an Order dated February 13, 1992, this Court struck Plaintiff's first amended complaint sua sponte because it "included Counts and named Defendants which were previously dismissed pursuant to this Court's Memorandum Opinion" of September 6, 1991. This Court granted Plaintiff 20 days leave to amend the complaint and ordered that the amended complaint "SHALL NOT include reference to any Counts or any Defendants previously dismissed by Order of this Court" (emphasis in original).

Contrary to the express terms of this Court's order, Plaintiff then filed a third and proposed fourth amended complaint against various Defendants [Travelers was served for the first time] alleging virtually the same causes of action contained in the first amended complaint struck by this

Court.[1] Furthermore, the additional counts and arguments contained in the third and fourth amended complaints (each of which spans 38 pages) were so intertwined, verbose, immaterial and confusing that it was impossible to ascertain with a reasonable degree of certainty what allegations were made and against which Defendants. While it appeared that only Count XII was directed against Defendant-Travelers (wherein Travelers, the worker's compensation carrier of Plaintiff's former employer, Eastern Airlines, is alleged to have violated an administrative law judge's discovery order in a New York state worker's compensation proceeding), Plaintiff generically referred to "Defendants" in nearly every other count.

Accordingly, on May 28, 1992, Travelers moved to

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[1] Plaintiff actually filed a second amended complaint prior to this Court's sua sponte dismissal, which complaint also improperly contained the same causes of actions and defendants.

strike or dismiss Plaintiff's Third Amended Complaint on grounds that Plaintiff's complaint was in violation of this Court's previous order or that it was impermissibly vague and ambiguous. Travelers also moved to dismiss the complaint because it did not state a claim upon which relief could be granted. Plaintiff never set forth in the complaint how he was damaged or injured by Traveler's actions. Moreover, Traveler's alleged misconduct in withholding a discoverable document in an administrative proceeding was simply not redressable in a separate legal proceeding.

On May 28, 1992, Travelers also filed a motion for protective order to stay discovery pending this Court's resolution of these dispositive motions. Travelers' motion to strike or dismiss and motion to stay discovery are currently pending before this Court.

On April 13, 1993, Plaintiff served Travelers with a motion for summary judgment based on the defective allega-

tions set forth in the Third Amended Complaint which have yet to be ruled upon by this Court.

Memorandum of Law

Travelers' respectfully requests this Court to strike Plaintiff's motion for summary judgment as premature or to stay it pending resolution of Travelers' previous dispositive motion to strike or dismiss Plaintiff's Third Amended Complaint. See Bagwell v. Brannum, 533 F. Supp. 362, 363 (N.D.Ga. 1982)(court must pass on dispositive motion to remand prior to reaching motion for summary judgment). This Court has the inherent power to stay part of this action based on considerations of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183 (1952).

Travelers has previously filed motions to dismiss or strike the very allegations which Plaintiff now claims he has

established as a matter of law. If the complaint is stricken, Plaintiff's summary judgment claim obviously falls. It is respectfully requested that this Court either strike or stay Plaintiff's motion as premature until resolution of Travelers' pending motions.

WHEREFORE, Defendant Travelers Insurance Company respectfully requests the Court to strike Plaintiff's Motion for Summary Judgment, or in the alternative, stay the motion until resolution of Travelers' pending motions. In the event the Court denies the requested relief, Travelers respectfully requests the Court to grant Travelers 90 days to conduct discovery and to respond to Plaintiff's motion for summary judgment.

Respectfully submitted,

HICKS, ANDERSON & BLUM, P.A.
New World Tower - Suite 2402
100 North Biscayne Blvd.
Miami, Florida 33132
Telephone: (305) 374-8171

BY: /s/
MARK HICKS
FL BAR NO.: 142436

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendant Travelers Insurance Company's Motion to Strike or Stay Plaintiff's Motion For Summary Judgment, or in the Alternative, to Extend the Time to Respond was served by U.S. mail this 15th day of April, 1993 on:

Daniel Gonzalez Gellert, pro se
P.O. Box 320370
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2020 K Street, N.W.
Washington, D.C. 20006

Maurice J. Baumgarten, Esq.
Eastern Airlines, Inc.
Miami International Airport
Building 16 - Room 440 MIALG
4800 N.W. 36th Street
Miami, Florida 33148

BY: /s/
MARK HICKS

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CASE NO. _____

DANIEL G. GELLERT,
Petitioner-Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, an employee benefit pension plan, and EASTERN AIRLINES, Inc. solely as Administrator of such defendant plan, PENSION BENEFIT GUARANTY CORPORATION, AIR LINE PILOTS ASSOCIATION, EASTERN AIRLINES PILOTS RETIREMENT BOARD a/k/a PENSION DISPUTE BOARD, ALAN C. GIBSON, WILLIAM R. TEGTMAN, JACK N. MOGUS, CHARLES COPELAND, and THE TRAVELERS INSURANCE CORPORATION,
Defendants.
_____/

APPLICATION AND PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

DANIEL G. GELLERT in pro se
P.O. 320370
Cocoa Beach, Florida 32932
(407 783-9412

Case No. ____ CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT:

DANIEL G. GELLERT
vs.
EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, et. al..

Air Line Pilots Association, ("ALPA")
Baumgarten, Maurice, Esq. Eastern Airlines, Inc.
Blank, Mark, Pension Benefit Guaranty Corporation ("PBGC")
Busto, Felice, Esq. ALPA
Callear, James Y. Esq. PBGC
Copeland, Charles, ALPA, PDB
Eastern Airlines, Inc. ("EASTERN")
Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots ("Plan")
Eastern Airlines Pilot Retirement Board a/k/a Pension Dispute Board ("PDB")
Flowe, Carol Connor, Esq., PBGC
Gibson, Alan, Eastern,
Green, Gary, ALPA
Kofman, Robert T. Esq. defendant ALPA's attorney
Mogus, Jack, N., ALPA, PDB
Moore, Michael, U.S. District Court Judge
Moreno, Federico, U.S. District Court Judge
Norfolk, Larry, L., PBGC
Pension Benefit Guaranty Corporation, ("PBGC")
Tegtman, William, Eastern
Hicks, Mark, Esq. attorney for defendant Travelers Insurance Company.

LIST OF EXHIBITS

1. ASSIGNMENT AND AUTHORIZATION FOR VOLUNTARY CHECK-OFF ASSOCIATION DUES

2. NOTIFICATION OF 90 DAYS EXPIRING AND RIPENESS FOR HEARING DATED August 6, 1993

3. NOTIFICATION OF 90 DAYS EXPIRING AND RIPENESS FOR HEARING dated July 21, 1993

4. MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS EASTERN AIRLINES PILOTS RETIREMENT BOARD, a/k/a PENSION DISPUTE BOARD, ALAN C. GIBSON, WILLIAM R. TEGTMAN, JACK N. MOGUS, CHARLES COPELAND, and THE TRAVELERS INSURANCE CORPORATION dated April 7, 1993

5. DEFENDANT TRAVELERS INSURANCE COMPANY'S MOTION TO STRIKE OR STAY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, OR TO EXTEND THE TIME TO RESPOND dated April 15, 1993

6. "DEFENDANTS" MOGUS AND COPELAND'S MOTION TO STRIKE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT DATED April 7, 1993 dated April 14, 1993

7. DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT DATED APRIL 7, 1993

8. MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS AND THE PENSION BENEFIT GUARANTY CORPORATION dated April 19, 1993

9. OPPOSITION OF DEFENDANT PENSION BENEFIT GUARANTY CORPORATION TO MOTION OF PLAINTIFF DANIEL G. GELLERT FOR SUMMARY JUDGMENT dated May 5, 1993

10. AMENDED MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT AIR LINE PILOTS ASSOCIATION dated April 19, 1993

11. DEFENDANT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL'S MOTION TO STAY PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT PENDING THE RESOLUTION OF OUTSTANDING DISPOSITIVE MOTIONS dated April 23, 1993

12. MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT EASTERN AIRLINES, INC., solely as Administrator of such defendant plan dated May 13, 1993

13. DEFENDANT EASTERN AIR LINES, INC. MOTION TO STRIKE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT dated May 20, 1993

14. THIRD AMENDED COMPLAINT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. _____

DANIEL G. GELLERT,

Petitioner-Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, et. al.,

Respondent-Defendants.

_____/

PETITION FOR WRIT OF MANDAMUS TO THE UNTIED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Petitioner, Daniel Gonzales Gellert is the Plaintiff in Case No. 90-1113-CIV-MOORE pending in the United States District Court of the Southern District of Florida, and files this petition for a Writ of Mandamus under Title V. Rule 21 of the Federal Rules of Civil Procedure, to command performance from the District Court, an inferior court

in this Circuit.

Plaintiff's Writ is to command ministerial duty, and to directing the restoration of Plaintiff's rights and privileges of which he has been deprived of, See: Nebel v. Nebel, 241 N.C. 491, 85 S.E.2d 876; Cohen v. Ford, 19 PaCmwth. 417, 339 A2d 175, 177; 28 U.S.C.A. #1361; Will v. United States, 389, U.S. at 95 88 S.Ct. at 273, and to direct the District Court to exercise its authority in recognizing the duty under the Constitution in protecting Plaintiff's rights.

The District Court has refused to grant the Plaintiff's rights and privileges under the First, Fifth, Seventh and Fourteenth Amendments of the Constitution as mandated by the Supreme Court. See: INTERNATIONAL ASSOCIATION OF MACHINIST v. STREET, 367 US 740.

The instant cause has survivability based upon Plaintiff's evidence in support of legally recognized claim for relief, which transcends Defendants' frivolous motions to

dismiss, and strike. See: FEDERAL DEPOSIT INS. CORP. v. WISE, 758 F.Supp. 1414 (d. Colo. 1991).

Plaintiff's Motion for Summary Judgments are based upon rights recognized by the Supreme Court, in which Defendants defaulted, failed to provide admissible evidence, failed to provide Memorandum of Law, and the court file has no evidence which could be used by a jury to find for Defendants.

The District Court below has violated Local Rule 7.1 B. 3., and has not decided or afforded a hearing on Plaintiff's Motion for Summary Judgment in the required 10 day period.

Neither Plaintiff nor the Defendants have other remedy available for relief, therefore, it is in the best interest of justice for this Honorable Court to **grant** the Application for a Writ of Mandamus.

The entry of a Summary Judgment based upon default

and the failure to meet the burden of proper response to a Motion for Summary Judgment is as the matter of law and not of fact.

For the stated reasons, this application should be granted for a Writ of Mandamus, and Summary Judgment in Plaintiff's favor should be entered as a matter of law.

STATEMENT OF THE FACTS

OVERVIEW

Plaintiff's instant complaint was pending before the District Court one year during April of 1993, when Plaintiff moved for Summary Judgment under Rule 56, Federal Rules of Civil Proc. and Local Rules 7.1 and 7.5, (formerly Local Rule 10).

Defendants did not provide admissible evidence as required by Rules 56 and 7.5, failed to provide affidavits based upon personal knowledge, failed to provide Memorandum of Law, and therefore, Plaintiff is entitled to the entry

of Summary Judgment as a matter of law.

BACKGROUND OF FACTS

This action was commenced when Plaintiff's attorney filed a two-count complaint on May 9, 1990, which was amended on May 29, 1990, generally setting forth the same two counts.

In an order filed on September 6, 1991 the District Court dismissed count I, and during January of 1992 granted Plaintiff the right to amend his complaint, Plaintiff in pro se filed the First and Second Amended complaints, which were struck sua sponte on February 13, 1992.

Plaintiff then filed the instant **THIRD AMENDED COMPLAINT**, and also filed an appeal with this Court for a determination if the District Court's order was final and binding, and this Court ruled that the Order was **not final**, (See: 92-4091) which granted Plaintiff's right to reassert this cause of action, which is pending herein with out a

judicial blemish.

Defendants did not file a response to Plaintiff's Third Amended Complaint, but moved to strike or dismiss, based upon Rule 12, Federal Rules of Civil Procedures, and these motions are frivolous and pending.

Defendants failed in their **burden** under Rule 12 (e), which specifically requires: "The motion shall point out the defects complained of and the details desired.", which burden prevents the trial judge from becoming an attorney for the defendants, and therefore should not be considered herein.

Defendants also failed to convince the trial court of Rule 12 (f) violations to strike, and arguendo, even if the Court struck some redundant, immaterial, impertinent or scandalous matter, Plaintiff's Third Amended Complaint would still survive. Again, defendants failed to point out defects complained of.

Interestingly, defendants did not raise defenses of dispositive nature, failed to argue or provide opposition as to Plaintiff's RICO, ERISA 510 & 511, discharge in violation of the Constitutions First, Fifth and Fourteenth Amendments, therefore the entry of a Summary Judgment is proper.

The Third Amended Complaint alleges that Defendants violated Plaintiff's Constitutional rights under the First, Fifth and Fourteenth Amendments for allegedly failing to pay union dues under the Railway Labor Act, (2)11, and based upon this discharge also denied his pension rights in violation of the Employee Retirement Income Security Act, Sections 510 & 511, through fraud, conspiracy and RICO.

Plaintiff through "self-help" obtained the authorization for the deduction of his union dues, (**EXHIBIT 1**), which document was still in effect and in the files of Defendant Air Line Pilots Association, "ALPA", on January 13, 1993, and is prima facie evidence that Plaintiff could not be

discharged for his failure to pay union dues, since he complied and authorized the automatic deduction of his dues obligation.

Defendants could not argue against their "own" document, fresh from their own files, therefore, Defendants defaulted in their Rule 56 burden to provide admissible evidence, and continue to argue their out of time motions to dismiss and strike, motions which were filed during March and April of 1992, well over a year ago.

Plaintiff was a pilot employee of Eastern Airlines, Inc. from on or about February 11, 1963 continuously until his discharge on June 17, 1986, following his occupational accident on June 15, 1986.

Defendants paid large sums of money to a so called "Neutral Arbitrator" with out any legal right, and the Plaintiff has alleged that this payment of money is a bribe, it was paid to have the Plaintiff's discharge upheld in arbitration.

Plaintiff has also alleged that Defendants Pension Dispute Board members, two of which were high ranking officials of ALPA, had personal interest in denial of Plaintiff's ERISA rights, and one of the Eastern members first discharged Plaintiff, then as an ERISA fiduciary denied his ERISA pension.

STATEMENT OF THE ISSUES

The issue before the Court is solely based upon properly filed Motions for Summary Judgment under Rule 56, Fed.R.Civ.Proc. and Local Rules 7.5 and 7.1 Florida Rules of Federal Courts for the Southern District.

Plaintiff having met his burden in the proper filing of Motions for Summary Judgment, has the right to seek the entry of a summary judgment under Rule 56 (e), which very specifically sets Defendants burden in the required responses, making very clear that mere allegations and denials can not be considered by the Court, but Defendants **SHALL** file

admissible evidence of affidavits based upon personal knowledge, and since Defendants did NOT so respond, summary judgment shall be entered if appropriate See: CELOTEX CORP. V. CATRETT, 477 US 317; ANDERSON v. LIBERTY LOBBY, INC., 477 US 242 and ADICKERS v. KRESS & CO., 398 US 144.

Local Rule 7.5 spells out Defendants' duty in responding to Plaintiff's summary judgment in stating: "The papers opposing a motion for summary judgment shall include a memorandum of law, necessary affidavits, ... All material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the opposing party's statement."

Local Rule 7.1 C. provides for an independent right for the entry of these summary judgment motions since Defendants did not file Memorandum of Laws: "Failure to do so may be deemed sufficient cause for granting the mo-

tion by default."

Defendants response to Plaintiff's Motion for Summary Judgment is a platform to continue their arguments for their "out of time" and fully briefed motions to dismiss and strike, and claim a judicial preemption against Plaintiff's rights to the entry of the summary judgment based solely upon "judicial economy". This argument is a genuine hybrid, the denial of Plaintiff's rights based upon this argument would indeed be a landmark decision.

Defendants are attempting to insert their claim that Rule 56 does not apply in all circumstances and is subject to legal interpretations and delay. This of course is false, in fact the **1946 Amendment** specifically was drafted to provide a speedy and earlier motion for summary judgment.

Defendants have cleverly moved away from the sole purpose of a summary judgment under Rule 56 (a): "The very mission of a summary judgment procedure is to pierce

the pleadings and to assess the proof in order to see whether there is genuine issue for trial" See: **1963 Amendment**.

Defendants have not denied, and clearly can not deny that (1). Plaintiff was discharged for the non payment of union dues, an issue which the Supreme Court has established as protected by the Constitution's First, Fifth and Fourteenth Amendments, See: INTERNATIONAL ASSOCIATION OF MACHINIST et. al. v. S.B. STREET, 367 US 740 (1961); COMMUNICATIONS WORKERS OF AMERICA and its Locals 2100, 2101 v. HARRY E. BECK, Jr., et. al., 108 S.Ct. 2641 (1988).

Plaintiff's Motion for Summary Judgment is based upon EXHIBIT 1, which document protected Plaintiff's employment, and his discharge for the non payment of union dues violated his Constitutional protection under the First, Fifth and Fourteenth Amendments.

(2). Defendants have denied Plaintiff's ERISA pension

rights based **SOLELY** upon his discharge of employment for the non payment of union dues, violates ERISA Sections 510 and 511, which is an independent right to sue.

(3). Defendants' denial of earned medical coverage as provided to other Eastern former employees and retirees also is an independent cause of action.

(4). Defendant ALPA breached its duty of fair representation since Plaintiff was an Eastern employee, not only did ALPA breach its duty of fair representation in failing to protect Plaintiff's ERISA pension rights, ALPA's General Counsel, Gary Green became an attorney of record in the original complaint in which **ALPA WAS NOT A DEFENDANT**, and demonstrated to all concerned that Defendants Jack N. Mogus and Charles Copeland were acting in ALPA's behalf as high ranking ALPA officials on Defendant Pension Dispute Board, and not as fiduciaries who were neutral and serving Plaintiff's best interest.

(5). Defendant Travelers Insurance Corporation, to date, has refused to provide earned medical coverage to Plaintiff, when it has lost before the Workers' Compensation Board, and knows that Plaintiff was injured while an Eastern employee.

(6). Defendants individually, collectively are a continuing threat to Plaintiff, in over seven (7) years, Plaintiff has lost his employment, his vested ERISA pension, his earned medical coverage, he has been defamed as an employee who was discharged under the Railway Labor Act as a "free rider", an employee who failed to authorize or pay his union dues, and has suffered intentional emotional distress as a result of Defendants unlawful and tort actions, fraud, conspiracy.

(7). Defendants' unlawful action is a violation of the RICO statute, a continuing action following other RICO cases conducted Defendant ALPA. See: LANDRY V. AIR LINE PILOTS ASSOCIATION INTERNATIONAL, AFL-CIO,

901 F.2d 404 (5th Cir. 1990).

Defendants' motions for definitive statements are spacious and unreal, frivolous since Plaintiff's complaint **is not vague** or ambiguous that Defendants can not reasonably be required to frame an answer, and Plaintiff **did offer evidence** in support of legally recognized claims for relief, motion to dismiss must also be denied, motions to strike may not be favored, they should only be granted when defendant can not reasonably be expected to frame responsive pleading or to defend against those portions of complaint. See: FEDERAL DEPOSIT INS. CORP. v. WISE, 758 F.Supp. 1414 (D.Colo. 1991).

Based upon the foregoing legal standard, Plaintiff's instant cause of action is safe from Defendants' motions filed more than a year ago.

Defendants' default under Rule 56 is fatal to their cause.

RELIEF SOUGHT

Relief sought by Plaintiff is the entry of Summary Judgments against Defendants:

> EASTERN AIRLINES PILOTS RETIREMENT BOARD, ALAN C. GIBSON, WILLIAM R. TEGTMAN, JACK N. MOGUS, CHARLES COPELAND, and THE TRAVELERS INSURANCE CORPORATION.
>
> AIR LINE PILOTS ASSOCIATION.
>
> EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS and THE PENSION BENEFIT GUARANTY CORPORATION.
>
> EASTERN AIR LINES, INC. solely as Administrator of such defendant plan.

Plaintiff has a right to the entry of summary judgment since the court file has no admissible evidence which could be used by the jury to find for the Defendants, no genuine issue of material fact remains for trial.

Plaintiff has provided admissible evidence from the very files of Defendants, and under Rule 56(c) of the Federal

Rules of Civil Procedure, when the nonmoving party bears the burden of proof at trial, as in this cause, summary judgment is warranted if nonmovant fails to make a showing sufficient to establish the existence of an element essential to the nonmovant's case. See: NEBRASKA v. WYOMING, 123 L.Ed. 2d 317 at 323 (1993); CELOTEX CORP. v. CATRETT, 477 US 317, 322; ANDERSON v. LIBERTY LOBBY, Inc., 477 US 242, 248; MATSHUSHITA ELEC. IND. CO. v. ZENITH RADIO, 475 US 574.

Plaintiff seeking protection under the Constitutions First, Fifth and Fourteenth Amendments has the right to has his case construed to do substantial justice. See: CONLEY v. GIBSON, 355 US 41.

REASONS WHY WRIT IS SOUGHT

The District court has violated Local Rule 7.1 B. 3., an act which has denied all parties the timely resolution of this suit.

The applicable ten day period has passed, and the District Court has **not** issued an order, nor has the Court set the matter for hearing.

The Clerk of Court properly sent the Notification of 90 days Expiring and Ripeness for Hearing. (EXHIBITS 2 & 3).

Clearly, the sole remedy available to all parties in this action, is the granting of this Writ of Mandamus to decide this Motion for Summary Judgment.

Local Rule 7.1 B. 3 is mandatory upon the trial court: it [court] **SHALL**, (emphasis added) set the matter for rehearing within 10 days of receipt of the notification or shall issue an order resolving the motion or other matter during that same 10 day period.

Plaintiff's cause has been pending in the Court below for over three years; the Third Amended Complaint for over a year and a half with out a single order being entered with

the sole exception of one for expansion of time.

Plaintiff's instant cause is based upon his rights under the Constitutions First, Fifth and Fourteenth Amendments. While Plaintiff is not eligible for a speedy trial rule in a criminal case, certainly, Plaintiff has a "weighted" case based upon the due process clause of the Constitution's Fifth Amendment.

The circumstances justifying the issuance of this Writ is based also on the questions in law which Defendants raised as new and important issues of law of first sight and first impression in moving to strike a Motion for Summary Judgment.

A denial of Plaintiff's rights under Rule 56 and Local Rules 7.5 and 7.1 based upon Defendants motions to strike will cause Petitioner damages or prejudice which can not be corrected by a future appeal.

Petitioner's application for this Writ is timely, and is

proper even before an Order would be entered by the Court below, since the documented default by the Defendants in their failure to place admissible evidence before the Court under Rules 56, and failure to provide the Memorandum of law under Local Rule 7.1 C. provides the entry of the Summary Judgments in favor of the Petitioner-Plaintiff as a matter of law.

For the foregoing reasons the Court should **grant** this application and petition for a Writ of Mandamus and **enter** an Order granting the Summary Judgments in Petitioner's favor.

Respectfully submitted,

/s/

DANIEL G. GELLERT in pro se
P.O. 320370
Cocoa Beach, Florida 32932
(407 783-9412

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-1113-CIV-MOORE

DANIEL G. GELLERT,

Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, et. al.,

Defendants.
_____/

OMNIBUS ORDER ON PENDING MOTIONS

THIS CAUSE came before the Court upon the various pending motions in this action. The Court has considered the motion, the responses thereto, and the pertinent portions of the record, and accordingly, enters the following Omnibus Order on all pending motions.

I. MOTION TO DISMISS

Defendants William Tegtman and Alan Gibson sought dismissal of Plaintiff's action against them because of their status as members of the Railway Labor Act ("RLA") dispute board. Judge Federico A. Moreno previously dismissed Plaintiff's action, with prejudice, against several members of the RLA dispute board, i.e. Jack Mogus and Charles Copeland because of that same status. See Order of Judge Moreno, entered September 4, 1991 (citations omitted). Plaintiff alleges that Gibson and Tegtman were members of the RLA dispute board. See Fourth Amended Complaint at ¶¶ 15 and 16, respectfully. Accordingly, Defendants Tegtman and Gibson are dismissed from this action with prejudice consistent with the law of this case. Defendants' Motion to Dismiss (DE #123) is **GRANTED**.

II. MOTION TO STRIKE PLAINTIFF'S THIRD AND FOURTH AMENDED COMPLAINT

Through various motions, the Defendants have moved

to strike Plaintiff's Third and Fourth Amended Complaints. Defendants assert that the Third and Fourth Amended Complaints contain counts and named defendants previously dismissed by order of the Court, United States District Judge Federico A. Moreno. In that Order, Judge Moreno, sua sponte, struck Plaintiff's First Amended Complaint for its reference to previously dismissed counts and defendants. The Order granted Plaintiff leave to amend, specifically prohibited Plaintiff from naming dismissed defendants or referencing dismissed counts in his amended pleading. Accordingly, as Plaintiff's Third Amended Complaint asserts claims against defendants previously dismissed by Judge Moreno in violation of Court Order, Defendants' Motions to Strike the Third and Fourth Amended Complaints are **GRANTED IN PART**.[1] Plaintiff's Third Amended Complaint is **STRICKEN**. Defendants, however, shall respond

---

[1] See Docket entries 130, 131, 133, 140, 155 and 169.

to the Fourth Amended Complaint, which does not include previously dismissed defendants, within thirty (30) days of the date of this Order.

III. MOTIONS TO STAY DISCOVERY

Defendants sought a stay of all discovery in this action pending resolution of the Motion to Strike the Third and Fourth Amended Complaints. As those motions are resolved, and no other basis for staying discovery exists, Defendants' Motions to Stay Discovery are **DENIED**. (DE ## 147, 154, 156 and 168).

IV. MOTIONS FOR DEFAULT

Plaintiff sought a default against Defendant Air Line Pilots Association for failure to respond to the Third and Fourth Amended Complaints. After consideration of Air Line Pilot's response, Plaintiff's Motion for Entry of Default is **DENIED**. (DE #137). Plaintiff also sought entry of defaults and default judgment against various defendants

while the Motions and Strike were pending. Accordingly, these motions are **DENIED**. (DE #216, 217, 218, 219, 225, 226, 227, and 228). Defendants' Motion to Strike Motion for Default is **DENIED AS MOOT**. (DE #224).

V. MOTIONS FOR SUMMARY JUDGMENT

Plaintiff filed numerous motions for summary judgment during the pendency of the motions to strike the Third and Fourth Amended Complaints. Accordingly, Plaintiff's Motions for Summary Judgment based upon failure to respond to discovery or the Amended Complaints are **DENIED**. (DE ## 187, 190, 194, 198, 200, 201, 206, 207, 210, and 211). Plaintiff may file appropriate substantive motions for summary judgment in accordance with Rule 56 of the Federal Rules of Civil Procedure after completion of discovery and only upon leave of Court. Plaintiff's Motion for Hearing on Motions for Default and Summary Judgment is DENIED AS MOOT. (DE #191).

Defendants' Motions to Strike Plaintiff's Motions for Summary Judgment are **DENIED AS MOOT**. (DE ## 189, 195, 196, 199, 209, 215). Air Line Pilot's Motion to Stay Plaintiff's Amended Motion for Summary Judgment is **DENIED AS MOOT**. (DE #203).

VI. REMAINING MOTIONS

Plaintiff's Motion to Enforce Constitutional and Statutory Rights is **DENIED** (DE #177). Defendants' Motions to Strike Plaintiff's Motion to Enforce Constitutional and Statutory Rights are **DENIED AS MOOT**. (DE ## 178, 179);

Plaintiff's Motion for Recovery of Legal Fees is **DENIED WITHOUT PREJUDICE** to be renewed if Plaintiff ultimately prevails in this action (DE #182);

Plaintiff's Motion for Entry of Order for Interlocutory Appeal is **DENIED** (DE #167);

Defendant Air Line Pilot's Motion to Strike Plaintiff's Notice that Air Line Pilots are obstructing justice (DE

#171) is **GRANTED**;

Plaintiff's Motion for Protective Order (DE #172) is **DENIED**;

Plaintiff's Motion for Judicial Notice (DE #197) is **DENIED**;

Defendant Pension Benefit's Motion for Status Conference (DE #205) is **DENIED**;

Plaintiff's Motion for Injunctive Relief (DE #208) is **DENIED**;

Plaintiff's Motion to Add Exhibits to opposition to Motion to Strike (DE #214) is **GRANTED**; and

Any and all pending motions, other than those specifically listed here, are **DENIED AS MOOT**.

DONE AND ORDERED in chambers at the United States Courthouse, Federal Courthouse Square, Miami, Florida this 10th day of September, 1993.

/s/
K. MICHAEL MOORE
UNITED STATES DISTRICT
COURT JUDGE

cc:

Daniel Gellert, pro se
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-4928

Filed Feb. 23, 1994

IN RE:

DANIEL G. GELLERT

Petitioner,

On Petition for Writ of Mandamus
to the United States District Court
for the Southern District of Florida

Before: ANDERSON, COX and BLACK, Circuit Judges.

BY THE COURT:

Petitioner's application for a writ of mandamus is denied because petitioner has an adequate remedy by appeal.

UNITED STATES COURT OF APPEAL
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

February 23, 1994

Daniel G. Gellert
P.O. Box 320370
Cocoa Beach, Florida 32932

RE: 93-4928 In Re: Gellert, Daniel G.
DIST. CT. No.: 90-01113-CIV-KMM

The enclosed certified copy of this Court's Order denying the petition for writ of mandamus is issued in lieu of the mandate of this court.

Please acknowledge receipt by returning the enclosed copy of this letter.

Sincerely,

MIGUEL J. CORTEZ, Clerk

BY: JOHN W. FlOYD
Deputy Clerk (404) 331-3833

Encl.

DIS-4 (6/92)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-4928

Filed July 8, 1994

IN RE:

DANIEL G. GELLERT

Petitioner,

On Petition for Writ of Mandamus
to the United States District Court
for the Southern District of Florida

BEFORE: ANDERSON, COX and Black, Circuit Judges.

BY THE COURT

Petitioner's "Suggestion of Rehearing In Banc," treated as a motion for reconsideration of this Court's order dated February 23, 1994, denying his petition for writ of mandamus is denied.

(5)

Supreme Court, U.S.
FILED
FEB 3 1995
OFFICE OF THE CLERK

NO. 94-1015

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

DANIEL G. GELLERT,
Petitioner,

V.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S RESPONSE BRIEF

BEST AVAILABLE COPY

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NO. 94-1015

In The
SUPREME COURT OF THE UNITED STATES

October Term 1994

DANIEL G. GELLERT
Petitioner

v.

UNITED STATES DISTRICT COURT for the
SOUTHERN DISTRICT OF FLORIDA
Respondent.

PETITIONER'S REPLY BRIEF

Respondent Travelers Insurance Company's argument highlights why this Court should grant the petition. Respondent begins with its own version of QUESTION PRESENTED, and has moved impermissibly to take over this pro se petition, for its own purposes, and would have this Court not address Petitioner's due process rights, which resulted from the trial judge being under an on going federal criminal investigation.

Respondents' claim that Petitioner had "adequate remedy", when his proper summary judgment motions are continued to be denied to date, is indeed spacious and unreal.

Other arguments, which allege in this petition, a jurisdictional issue as dispositive as a motion to remand, is fallacy, and respondents' "abundance of caution" and motion to strike, are fatal to respondents and support the entry of the motions for summary judgments as a matter of law.

This petition, should be considered by this Court for certiorari or as an Extraordinary Writ, based upon these facts.

Petitioner was denied a fair and impartial hearing, before the district court and appeals court. All citizens, all parties in litigations should be granted judges free from the taint of criminal wrong doing, which clearly did not happen in this cause, and this Court should resolve this issue.

PETITIONER'S RESPONSE

Respondents' silence on the key issues of this petition is deafening; respondents have carved out Questions Presented for Review which limit the petitioner's rights to be heard by this Court, and provide for a complete denial of petitioner's rights under the Constitution.

Petitioner's instant cause call for an exercise of this Court's power of supervision, to examine and rule upon the duty of the judiciary in cases where the presiding trial judge is under felony criminal investigation. In this cause the trial judge was investigated by the FBI, Department of Justice and a Federal Grand Jury for felony criminal violations of federal statutes. The integrity of the district court had a lack of credibility, impartiality necessary to rule upon Petitioner's summary judgment motions.

Respondent Air Line Pilots Association, ("ALPA"), while informing this Court that Petitioner did raise issues of the trial court's criminal legal problems, the Appeals Court failed to grant relief. Respondent in footnote 1/ states: "Petitioner's scandolous accusation against the district court judge . . . Petitioner's, unsuported, irrational, and tenuous claims" are false, impeached by the reversal of 14 trials that Judge K. Michael Moore had at same and exact period as petitioner's cause, while under criminal investigation. App. 1, (Miami Herald article covering the September 9, 1994 Order.)

Respondent ALPA's total disregard for the truth, the obvious disregard for the integrity of the judiciary is only secondary to its dishonesty in dealing with its own members, and toward the employees that it owed duty of fair representation to, under the contract, the Constitution.

STATEMENT ON JURISDICTION

A. Rule 10 invokes the inherent duty of this Court to exercise power in supervising courts below, when a sitting judge in the federal judiciary is the subject of a criminal probe, it raises issues of basic judicial integrity. B. Rule 20 provides for the instant petition to rise to a level of an Extraordinary Writ, to be an aid of this Court's appellate jurisdiction, certainly a review of a criminal investigation of a sitting judge must rise to the level of sufficient exceptional circumstance to warrant the exercise of this Court's discretionary powers.

While respondents would minimize this petition, and reduce the gravamen to the ticking of a clock, Petitioner did file for assistance from the Appeals Court, App. 2, and a protective order was issued. Respondent's opposition is groundless. This Court has jurisdiction.

RESPONSE TO STATEMENT OF THE CASE

Respondents are impeached by their own silence, Respondents Solicitor General, in representing Judge K. Michael Moore, the United States, the Department of Justice could not find a voice to speak, Eastern Airlines, Inc., and the Pension Benefit Guaranty Corporation are not opposing the petition.

Respondent Travelers Insurance Company, ("Travelers"), has defrauded Petitioner of millions, the Pension Benefit Guaranty Corp., ("PBGC"), is defrauding Petitioner of millions in vested pension benefits, Eastern Airlines, Inc., ("Eastern"), used the Constitutionally protected forced collection of union dues to move against an airline pilot employee who refused to join an on going criminal enterprise to defraud the United States and the passengers of Eastern. Respondent ALPA violated its duty of fair representation,

and committed fraud in filing a false request to demand Petitioner's discharge, when in fact Petitioner had proper authorization for the voluntary deduction of union dues, and Petitioner's cause clearly has invoked Constitutional issues and protection under the First, Fifth and Fourteenth Amendments, which respondents would ignore.

Petitioner had the right under Rule 56 to seek a summary judgment on this basis, which provided for the entry of his motions for summary judgments, both as to meeting the substantive law requirements, and the material fact issue, which provides that the respondents' have no genuine issues for a trial, and Petitioner is entitled to these judgments as a matter of law.

Interestingly, respondents have not been able to provide even one case in support of the blatant denial of Petitioner's Rule 56 rights, and the petition is unopposed.

Respondent's assertions that no proper response to a Rule 56 motion is required while some motions are pending, is impeached by Rule 56, and its 1946 Amendment.

Further, some district court case, which is not a precedent, and which deals with an issue of jurisdiction based upon a motion to remand a case to a state court, can not be considered as authority to file a motion to strike a motion for summary judgment.

Rule 56, and Local Rules 7.1, 7.5, are controlling herein.

Respondent Traveler's claim is false, Petitioner has not received a remedy in the district court, Petitioner's proper motions for summary judgments have not been granted to this date, and it is not a mute issue, but is a viable request pending before this Court, herein.

The instant petition does not frustrate the appellate process, it seeks a remedy.

RESPONSIVE ARGUMENT

Petitioner clearly moves this Court for relief, and for a decision which will examine the rights of citizens to courts of integrity, courts free from the shadow of criminal investigation.

In this cause, Judge K. Michael Moore failed to disclose and disqualify himself from proceedings in which his impartiality can be reasonably questioned.

The judge, and the Department of Justice impermissibly kept the criminal investigation of Judge Moore a secret, failed to disclose this fact to Petitioner, failed to provide an opportunity for Petitioner to seek recusal, prior to the unjust denial of Petitioner's proper motions for Rule 56 summary judgments.

Based upon the foregoing, this Court should grant a remedy, fashion an appropriate relief, and make this Petitioner's case whole, and remand the issues on the summary judgments.

The Court can remand the issue of the summary judgments to the district court, with clear instructions to assign a new judge, to consider Petitioner's motions for summary judgments in the specific constraints of Rule 56, Federal Rules of Civil Procedures, and Local Rules 7.1 and 7.5. Vacate the judgment entered in Case No. 90-1113, and the adverse Bankruptcy decision in Case No. 89 B10448, under Rule 16.1, to remedy Petitioner's right to a fair and impartial hearing.

Also, this Court can consolidate Petitioner's other appeal, Case No. 89-5378, Appendix 4 and 5. Rule 11 authorizes this action, since that cause has been stayed by bankruptcy, and that case is in its present form as in Appendix 4 and 5.

Appendix 3, demonstrates the inability of Petitioner to recover from the Eastern estate in the U. S. Bankruptcy Court.

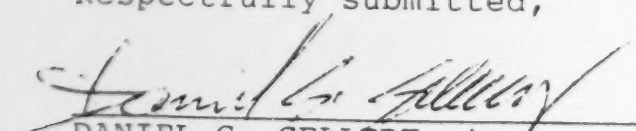
CONCLUSION

In this cause, four giants, each having a special duty to Petitioner, have confederated, and defrauded him of millions, violated his undeniable Constitutional rights under the First, Fifth and Fourteenth Amendments, and have opposed this petition. Respondents' opposition is veneer, lacking substance.

Claims of untimeliness, adequate remedy by a future appeal is an empty assertion, Petitioner's recovery as to the Eastern estate is over. A hostile district court is waiting for the Petitioner, he challenged that court.

WHEREFORE, based upon the foregoing reasons and authorities, Petitioner respectfully requests that this Petition be **granted.**

Respectfully submitted,



DANIEL G. GELLERT, in pro se

(6)

FILED
FEB 3 1995
OFFICE OF THE CLERK

NO. 94-1015

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

DANIEL G. GELLERT,
Petitioner

v.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO RESPONSE BRIEF

In pro se by:
Daniel G. Gellert
P. O. Box 320370
Cocoa Beach, FL 32932
(407) 783-9412

Topp

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The judge was under investigation

By DAVID LYONS
Herald Staff Writer

In a decision that could cost taxpayers millions, a federal judge has ordered 14 Miami criminal cases retried, including a high-profile bank fraud prosecution, because a South Florida judge did not recuse himself while he was under government scrutiny.

The most notable of the cases includes the fraud convictions of former Republic National Bank President Fred de la Mata and fellow executives Manuel A. Calas and Oscar Castilla, and businessman Enrique Fernandez. That trial, a complicated bank fraud case, lasted 2 ½ months.

Another lengthy case involved Israel Abel, a U.S. citizen convicted of drug trafficking after he was apprehended in Costa Rica, which later protested his extradition.

The judicial controversy centers on U.S. District Judge K. Michael Moore, a Coral Gables resident who was appointed to the bench after a stint as director of the U.S. Marshals Service.

Between 1992 and early this year, prosecutors in Brooklyn, N.Y., investigated whether Moore accepted improper gratuities while he headed the Marshals Service. Ultimately, the government dropped its investigation and determined that no criminal charges should be brought.

But after hearing about the probe, defense lawyers in 14 cases he oversaw argued that the judge should have told them about his situation before their trials started and offered to recuse himself.

Their reason: The judge might have favored the government's lawyers during court proceedings in the hopes of getting a break in his own case.

After reviewing the matter for several months, U.S. District Judge William C. O'Kelley of Atlanta agreed with the defense lawyers. He granted new trials for their clients.

"Quite simply, and quite universally, recusal is required whenever impartiality might reasonably be questioned," O'Kelley wrote in an order released Monday but dated Sept. 9.

Moore was unavailable for comment, a secretary said.

U.S. Attorney Kendall Coffey, whose office faces the possibility of spending millions to retry the cases, as well as the task of recalling countless witnesses, said Monday that his staff is reviewing its options.

"It could range from seeking reconsideration from Judge O'Kelley, to seeking appellate review," Coffey said. No new trial dates had been set.

Appendix 2

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO. 93-4928

IN RE:

DANIEL G. GELLERT,

Petitioner.

On Petition for Writ of Mandamus to the
United States District Court for the
Southern District of Florida

PETITIONER'S MOTION FOR PROTECTIVE ORDER

Petitioner, in pro se, moves this Court for a protective Order from the time of receipt of this Motion, until July 5, 1994. Petitioner will be out of this jurisdiction during that period, as a result of the unsolved murder of Petitioner's daughter on March 20, 1994, the need for security considerations of Petitioner's immediate family requires this absence to undisclosed location.

Petitioner has a Suggested Inbanc Rehearing pending before this Court, and Petitioner prays for protective relief until July 5, 1994, as to any time for response to any order under the federal or local rules in this instant cause, as Petitioner would file for Certiorari with the Supreme Court in the 90 day period.

Respectfully submitted,

\s\

DANIEL G. GELLERT in pro se
P.O. 320370 Cocoa Beach, Fl. 32932
(407) 783-9412

Appendix 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by mail this 5 day of May, 1994, to:

Robert T. Kofman & Gary Green
2200 Museum Tower
150 West Flagler St.
Miami, Fl. 33130

Mark Hicks
Suite 2402 New World Tower
100 North Biscayne Blvd.
Miami, Fl. 33132

Maurice J. Baumgarten
Suite 3300 International Place
100 Southeast Second St.
Miami, Fl. 33131

Mark Blank
Pension Benefit Guaranty Corp.
K Street, N.W.
Washington, D.C.

K. Michael Moore
U.S. District Court
301 N. Miami Ave.
Miami, Fl. 33128

\s\
DANIEL G. GELLERT
P.O. 320370
Cocoa Beach, Fl. 32932
(407) 783-9412

Appendix 3

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter
of
IONOSPHERE/EASTERN AIR LINES, INC.
Debtors

Case No. 89 B 10448

November 15, 1994

United States Custom House
One Bowling Green
New York, New York 10004

Hearing on Trustee's 3rd omnibus objections to employee claims (individual employees claims and non-employee prepetition litigation claims).

B E F O R E:

HON. BURTON R. LIFLAND,

Bankruptcy Judge

Appendix 3

IONOSPHERE/EASTERN AIR LINES, INC.

APPEARANCES:

VERNER, LIIPFERT, BERNHARD, McPHERSON AND HAND, CHARTERED

Special Counsel to Trustee

600 Travis

2600 Texas Commerce Tower

Houston, Texas

BY: JOHN P. CAMPBELL, ESQ., of Counsel

and

BY: ANNE M. FERAZZAI, ESQ., of Counsel

IONOSPHERE/EASTERN AIR LINES, INC.

Appendix 3

PROCEEDINGS

MR. CAMPBELL: We will now turn to the matter of Mr. Gellert. Mr. Gellert is here and invite him to come forward at this time.

MR. GELLERT: I was called from Houston and I was told I would receive some documents by Fed Ex last Friday, which I did not receive. I left for work on Saturday but the gentleman just showed me a document. I didn't have time to study it. But I would like to put into evidence the exhibit, Summary Judgement motion and the response from Eastern and two other Court documents.

MR. CAMPBELL: May I suggest for the record, since we are the objecting party, we outline where we are going and then it will be his turn to put those in.

THE COURT: Yes, you are making the motion. Go ahead.

MR. CAMPBELL: I will begin.

What we have in the matter of Mr. Gellert is actually two lawsuits that are on file elsewhere. We have a lawsuit

on page 35 of the objection. It's described as being in the Southern District of Florida, and it's case number 881114.

This was case that is basically a challenge to Mr. Gellert's discharge, which occurred in the mid-80's. Mr. Gellert was a pilot. He was terminated. He filed a grievance pursuant to the ALPA contract. It went to a proceeding before the Pilot System Board of Adjustment, and Mr. Gellert did not prevail.

He filed this suit in the Southern District of Florida claiming that Eastern violated the Railway Labor Act when it allegedly refused to withhold dues money and pay it over to ALPA which caused his termination because the contract required him to pay dues.

The District Court in Florida dismissed that case and it was appealed to the 11th Circuit where the stay is in effect and the matter is stayed up there.

Throughout this rather exhaustive litigation Mr. Gellert has now shown that this particular lawsuit has any merit. The law is quite clear that the discharge of an employee, such as a pilot covered by the Railway Labor Act

under a union contract is a minor dispute and that the federal District Court lacked jurisdiction to review discharges that are in fact minor disputes.

The choice made by Congress years and years, decades and decades ago in the case where carriers, railroads, and airlines, these carriers and their unions would be required to have the equivalent of System Boards, have a mandatory arbitration procedure, and the complaints were to be washed through that system, and that was the final and binding resolution of minor disputes.

And so minor disputes, as this classically is, are not subject to review in the Federal District Court, and for that reason we say that the lawsuit in Florida, the first lawsuit we mentioned, has no merit, and therefore the claim should be disallowed and the lawsuit's value should be submitted at zero.

With respect to another lawsuit, this one was couched a bit differently. It is a lawsuit which in essence is a challenge to its termination, again in a different guise. This is the lawsuit that the response filed to this instant

proceeding says that there is a $12 million default judgement against Eastern, but there is in fact no such default. And on that point I would proffer the testimony of Maurice Baumgarten, who is here today, a former Eastern in-house lawyer, who is now in private practice. But one of his charges is to continue representing the estate in the Gellert litigation, and he would testify there is in fact no default as to these Debtors, $12 million or any other amount.

This lawsuit is Florida, the second lawsuit, page 13 of the reply and page 36 of the original objection, is merely another challenge to the termination that occurred in 1986. The same law applies; that is, that the discharge was a minor dispute, went to a System Board of Adjustment. He had his bite at the apple. That was his exclusive remedy. And that's that.

So there is no merit to that lawsuit, and so the value of that lawsuit should be estimated at zero. To the extent the proof of Claim is on file for the lawsuit, why, it should be disallowed.

MR. GELLERT: Unfortunately, the gentleman really

misrepresents the facts.

THE COURT: Before we go further, there is an offer of testimony. The witness is available. Do you want to examine the witness?

MR. GELLERT: I would like to respond to his statement first.

THE COURT: I am just asking.

MR. GELLERT: Yes. Definitely.

THE COURT: Put the witness on the stand.

MR. GELLERT: He made an opening remark. Could I respond?

THE COURT: He didn't make an opening remark. He proffered testimony through a witness, and I am giving you the opportunity to examine the witness.

MR. GELLERT: I would like to respond for just thirty seconds, if I may.

THE COURT: Go ahead.

MR. GELLERT: I just wanted to respond to the fact that he brought in that the Railway Labor Act is an exclusive remedy here. When the Supreme Court in IAM versus - -

A I don't know how many men were on the board. I think there were maybe two company representatives and two union representatives and a neutral named Lawrence Ciebel.

Q I show you this. Do you recognize this?

A Yes, this looks like one of your myriad motions for Summary Judgement which you filed in the second Florida case.

Q Please - -

A Let me answer.

MR. GELLERT: it is not myriad motions. I don't like to be put down.

THE COURT: I realize you are pro se. That was not putting anybody down. The word "myriad" is a very simple one, it's one of many is what the statement is.

MR. GELLERT: This is the first Summary Judgement motion filed against Eastern Air Lines.

THE COURT: Mr. Gellert, you don't have to editorialize about everything. The witness made a very clear, concise statement, that it's one of many, that is what

the word "myriad' means.

Q Do you recognize this?

A Yes. This was the response that I filed on behalf of Eastern - -

Q Is it a memorandum of Law?

A Let me finish my answer.

This was the response that I filed, the response that I filed on behalf of Eastern, which consists of a motion to strike your Motion for Summary Judgement.

Q Is the motion to strike a proper motion against a Summary Judgement? Is that recognized by a court of law?

A Yes.

Q It is. On a Summary Judgement?

A Yes.

Q Is there a Memorandum of Law attached to this under Local Rule 71?

A I believe that this constitutes a Memorandum of Law under local rule of the Southern District of Florida.

Q Could you point out the Memorandum of Law,

please.

A Starts with paragraph 1 and ends with paragraph 9.

Q Did you receive a copy of this?

A I don't believe I saw this yet. I think it's the first time I am seeing this.

Q Are you acquainted with the Supreme Court case IAM versus Street?

A I heard of it, but I can't tell you what is in it.

MR. GELLERT: No more questions.

REDIRECT EXAMINATION BY MR. CAMPBELL:

Q Mr. Baumgarten, do you remember the record well enough to recall whether in 1986 or so an arbitration proceeding was held before a one-man or a multi-man board, whether it was under Section 102 or another section of the ALPA contract?

A I believe it was under a section of the ALPA contract, but I can't tell you what section it was.

MR. CAMPBELL: No further questions.

THE COURT: Thank you, sir.

MR. GELLERT: Can a proffer this as evidence now, sir?

THE COURT: Show it to Mr. Campbell.

MR. GELLERT: (Handing)

MR. CAMPBELL: I have no objection to the admission of these pleadings.

MR. GELLERT: Mark this as Plaintiff's Exhibit 1 in evidence.

THE COURT: It is received.

(The above described document was marked Plaintiff's Exhibit 1 in evidence, as of this date.)

MR. GELLERT: This as Exhibit 2 in evidence.

(The above described document was marked Plaintiff's Exhibit 2 in evidence, as of this date.)

MR. GELLERT: This is Exhibit 3 in evidence.

(The above described document was marked Plaintiff's Exhibit 3 in evidence, as of this date.)

MR. GELLERT: This is exhibit 4 in evidence.

(The above described document was marked Plaintiff's Exhibit 4 in evidence, as of this date.)

MR. CAMPBELL: At this point, Your Honor, we move with respect to the first named lawsuit, which has a Proof of Claim on file, to disallow the claim as having no merit.

With respect to the second lawsuit, I don't believe there is a Proof of Claim on file, but there is no showing that lawsuit has any merit but anything other than a discharge claim in another guise, therefore we ask with respect to the second lawsuit its value be estimated at zero.

MR. GELLERT: Your Honor, the U.S. District Court received two motions to dismiss from the Defendants, from the Debtors on that same legal argument, and they have been both denied. Summary Judgement is pending, and according to the local rules the Judge should decide them within the next ten days.

It is a viable case. It is protected by the Constitution's 1st, 5th and 14th Amendments as to the

forced collection of union dues, and all of these cases have been resolved by the Supreme Court in favor of Plaintiffs. The Court has recognized the constitutional provisions as to the collection of union dues.

MR. CAMPBELL: Again, Your Honor, there is simply no merit to the lawsuit, no merit shown, references to various Amendments to the Constitution notwithstanding, and therefore we rest on our motion.

THE COURT: With respect to motions for Summary Judgement, isn't there a preclusion in the Florida Court's Order prohibiting further motions for Summary Judgement without leave of the Court?

THE WITNESS: Yes, there are, Your Honor.

THE COURT: I don't see anything introduced here that shows that there has been some dispensation given with respect to this latest motion.

MR. GELLERT: Your Honor, the Court denied the Summary Judgement motion until discovery was to be completed. Discovery was completed around the 10th of May. So at six months down the road, the Summary

Judgement motion is now ripe. The document from the Clerk of the Court above shows that it falls under the ripeness rule. It's been pending for over ninety days and it should be resolved.

MR. CAMPBELL: May I ask Mr. Baumgarten to address that, with leave of the Court?

THE COURT: I haven't heard anybody answer my question. But, Mr. Baumgarten, since you are here and are familiar with this matter and have identified your familiarization with the exhibits, I will hear from you. You are still under oath.

THE WITNESS: First of all, there is still a pending motion to dismiss by Eastern in the case that was pending in the Southern District of Florida. There are no pending Summary Judgement motions by Mr. Gellert. Mr. Gellert's sole basis for seeking Summary Judgement is because he believes that Eastern and the other Defendants were in default for failing to file what he believes are the necessary responses to the motions for Summary Judgement which he filed.

In addition, to denying Mr. Gellert's Summary Judgement motions and in addition to prohibiting Mr. Gellert from filing any further Summary Judgement motions without prior leave of the Court, I believe attached to the Trustee's reply in this case in the District Court's Order, the Court denied Mr. Gellert's motion to have Eastern be held in default. And that was the status of the case.

THE COURT: Based on - -

MR. GELLERT: Could I respond to that?

THE COURT: Sure.

MR. GELLERT: The Judge has not ruled on the Summary Judgement motions and has not ruled on their response. Their response is in default of the procedure under Rule 56, Federal Rules of Civil Procedure and Local Rule 7.1 and 7.5.

The Judge ruled that Summary Judgement motion is denied until such a time as the discovery is complete and that leave of Court has to be obtained.

I did file after discovery was concluded for leave of Court, and that is what is part of the ripeness for filing

that came from the Clerk that under the local rules the Judge should either hold a hearing and decide the case in ten days or make a decision on those motions within ten days.

THE COURT: Based upon this record, there seems to be an initial set of facts which really form the underpinning for both lawsuits. The first lawsuit has been washed through and received the judicial determination, and that was on appeal, as I understand it; is that correct?

MR. CAMPBELL: That is correct.

THE COURT: But there was in connection with that lawsuit an opinion or finding by a Magistrate and then a confirmation and a de novo reviewed by the District Court, was it?

MR. GELLERT: That was true. That particular lawsuit did not challenge the discharge - -

THE COURT: I understand. But you have got two Proofs of Claim here, and I am dealing with the merits of those Proofs of Claim.

I do not find any merit to the underlying Proof of Claim with respect to the first lawsuit nor do I find that

your contention that you have a $12 million default judgement accurate, and I do not see that there is any underlying merit likewise to that lawsuit.

So under all of the circumstances here, if I were to estimate the claim based upon a lack of merit, I would be forced to estimate it at zero. I see little likelihood of the latest motion being successful.

Submit an Order.

MR. CAMPBELL: Thank you, Your Honor.

THE COURT: I ought to note for the record with respect to the Gellert claim, that, among other things, he asked for cert. to the Supreme Court, and I don't know whether that is from the denial of his request for an en banc hearing concerning a denial of a mandamus of the District Court. I take it the mandamus deals with the first lawsuit or does that deal likewise with both lawsuits or either one?

THE WITNESS: The mandamus deals with the second lawsuit and the District Court's Order denying his motions for Summary Judgement and not letting him file any other.

THE COURT: It seems like he had so many bites at the apple that he already consumed it.

THE WITNESS: He will still be biting, Your Honor.

Appendix 3

CERTIFICATE

I, ROBERT PAYENSON, a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That I reported the proceedings hereinbefore set forth, and that the foregoing is a true record of the proceedings herein.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

/s/_____

Appendix 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-1114-Civ-SPELLMAN

DANIEL G. GELLERT,
Plaintiff,
v. REPORT AND RECOMMENDATION

EASTERN AIRLINES, INC.,
et. al.,
Defendants

_____/

Presently before the Court for consideration is defendant's Motion to dismiss (DE 11) Plaintiff's First Amended Complaint (DE 8). The Honorable Eugene P. Spellman, United States District Judge, referred this matter for all permissible judicial proceedings as provided by the Magistrate's Act and Magistrate Rules for this District.

Plaintiff seeks redress from defendant Eastern Airlines (EAL) for purportedly violating 45 U.S.C. Par. 152 Eleventh (b) which provides in relevant part:

> any carrier or carriers as defined in this chapter and labor organization or labor organizations duly designated and authorized to represent employees in accordance

with the requirements of this

> chapter shall be permitted -- . . . .
> (b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly-required as a condition or acquiring or retaining membership: Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

Plaintiff claims a violation occurred when defendant EAL failed to withhold certain sums of money from his salary in order to pay the Air Lines Pilots Association (ALPA) in satisfaction of a Letter of Agreement regarding contract

Maintenance Fees and Check-Off entered into between defendant EAL and ALPA. (First Amended Complaint at 2-6). Plaintiff claims defendant EAL's actions ultimately caused his termination.

Stemming from these same facts, plaintiff also seeks redress from defendant EAL pursuant to Florida Statutes Par. 448.045 making it unlawful for two or more persons to agree, conspire, combine or confederate together to cause the discharge of any person in any firm or corporation (First Amended Complaint at 9). In the final count of his Complaint, plaintiff seeks redress from defendant United States Aviation Underwriters Incorporated for intentional tortious interference with the employment relationship between plaintiff and defendant EAL (First Amended Complaint at 11).

Plaintiff asserts jurisdiction as to the first count pursuant to 28 U.S.C. Par. 1331 as well as 28 U.S.C. Par. 1337. As to the second and third counts, plaintiff relies on pendant and pendant party jurisdiction respectively.

Appendix 4

Defendant's Motion to Dismiss

Defendant contends the conduct complained of by plaintiff constitutes a "minor grievance" under 45 U.S.C. Sub.Par.151, 184 which establish arbitration boards as the exclusive forum for resolution of such disputes, thus effectively precluding federal courts from obtaining subject matter jurisdiction (Defendants Motion at 2). Defendant contends that if no subject matter jurisdiction exists as to plaintiff's first count, then the second and third counts must also fail as they rely on the first to supply the basis for federal jurisdiction.

In the alternative, defendant suggests that "in the unlikely event that the Court does find subject matter jurisdiction for Count I, the court should decline to exercise its power to assert pendant-party jurisdiction over (defendant United States Aviation Underwriters Incorporated) in Counts II and III of Plaintiff's First Amended Complaint" as state court provides an adequate forum for resolution of those claims (Defendant's Motion at 3).

Appendix 4

Analysis

Is it "Major" or "Minor"

"Major" disputes

> [relate] to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

Elgin, Joliet, and Eastern U. Co. v. Burley, 325 U.S. 711, 723 (1945).

On the other hands, "Minor" disputes contemplate

> the existence of a collective bargaining agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one, The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case.

Appendix 4

Plaintiff alleges defendant (EAL) "violated 45 U.S.C. Par. 152 Eleventh (b), by denying [plaintiff] a fair opportunity to effect the deduction . . ." (First Amended Complaint at 6, para. 37) representing his share of the costs "of negotiating and administering a collective agreement and of adjustment and settlement of disputes" (Id. at 3, para. 14). Plaintiff contends his complaint states neither a "major" nor a "minor" dispute but rather states a claim arising "out of the interpretation and construction . . ." of 45 U.S.C. Par. 152, Eleventh (b). (Supplement to Response at 2).

In essence, therefore, plaintiff contends defendant EAL's refusal to deduct monies pursuant to the check-off agreement as requested by plaintiff constitutes a violation of the above-cited statute. We do not agree.

In the first place, the express language of the statute regarding withholding fees from employee's earnings is permissive, not mandatory. The section provides that: "notwithstanding any further provision of this chapter . . . any carrier . . . as defined in this chapter and a labor organization . . . duly designated in accordance with the

requirements of this chapter shall be permitted . . . . " 45 U.S.C. Par. 152, Eleventh (b) (emphasis added). Plaintiff has not alleged any mandatory duty exists on defendant EAL's part to withhold the funds - either from the statute itself or from the Letter of Agreement regarding Contract Maintenance Fees and Check-Off entered into between defendant EAL and defendant ALPA.

Second, cases involving interpretation of 45 U.S.C. Par. 152, Eleventh (b) typically involve interpretation of union security agreements, Klemens v. Air Line Pilots Ass'n, Intern., 736 F.2d 491, 496 (9th Cir. 1984), or the method of revocation available to employees under that section. Felter v. Southern Pacific Co., 359 U.S. 326, 333 (1959).

Finally, a careful reading of the facts alleged in plaintiff's First Amended Complaint indicate attempts to artfully plead a wrongful discharge in the clothing of an alleged statutory violation.

Appendix 4

Conclusion

We are cognizant of the presumptions enjoyed by a plaintiff when the court considers a motion to dismiss. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) and Conley v. Gibson, 335 U.S. 41, 45-6 (1957). Even after affording plaintiff all necessary presumptions, however, we cannot escape the conclusion that the First Amended Complaint fails to state a claim pursuant to 45 U.S.C. Par. 152, Eleventh (b).

Regarding plaintiff's remaining two claims, we need not look far to resolve whether they state a claim independent of the first claim. As noted by plaintiff Counts II and III both rely upon pendant party jurisdiction derived from Count I. If, as we have concluded, this Court has not been presented with a viable claim in Count I, then Counts II and III also must fail.

For the above-noted reasons and after careful review of the entire record in this matter, it is

RECOMMENDED that plaintiff's First Amended Complaint be DISMISSED for failure to state a claim upon

which relief can be granted.

The parties may serve and file written objections to this Report with The Honorable Eugene P. Spellman, United States District Judge, within ten (10) days of receipt. See 28 U.S.C. Par. 636(b)(1)(C); United States v. Warren, 687 F.2d 347 (11th Cir. 1982), cert. denied, 460 U.S. 1087 (1983); and Hardin v. Wainwright, 678 F.2d 589 (5th Cir. unit B 1982). See also Thomas v. Arn, 474 U.S. 140 (1985).

Dated in Miami, Florida, on this 15th day of February, 1989.

/s/_____

Samuel J. Smargon

United States Magistrate

cc: Counsel of record

Appendix 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-1114-CIV-SPELLMAN

FILED APRIL 4, 1989

DANIEL G. GELLERT,
Plaintiff,

vs

EASTERN AIR LINES, INC.,
and UNITED STATES AVIATION
UNDERWRITERS INCORPORATED,
Defendants.

_____/s/

ORDER OF ADOPTING AND AFFIRMING MAGISTRATE'S RECOMMENDATION AND ORDER OF DISMISSAL

THIS CAUSE comes before the Court upon the Magistrate's report and recommendation regarding the Defendant's Motion to Dismiss. After a *de novo* review of the recommendation, the objections thereto, and of the record. it is hereby

ORDERED AND ADJUDGED that this Court ADOPTS AND AFFIRMS said recommendation and that Motion is

GRANTED. This cause is DISMISSED, for failure to state a claim upon which relief can be granted.

It is further ORDERED that the Plaintiff's Motion to Set Aside Order Setting Case for Trial is MOOT.

DONE AND ORDERED in Chambers at Miami, Florida this 27th day of March, 1989

_____/s/
UNITED STATES DISTRICT JUDGE

cc: all counsel of record

Appendix 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DANIEL G. GELLERT	
Plaintiff,	CASE NO.90-1113 CIV-MOORE
v.	
EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, an employee benefit pension plan, and EASTERN AIR LINES, INC. solely as Administrator of such defendant plan, et al.,	
Defendants	

DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT DATED APRIL 7, 1993

Defendants Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots, Eastern Air Lines, Inc. ("Eastern"), William R. Tegtman, Noel Honohan, and Alan C. Gibson (hereinafter collectively referred to as "Defendants"), hereby respectfully request that the Court strike Plaintiff's motion for summary judgement against

Defendants, dated April 7, 1993. In support thereof, Defendants state the following:

1. On January 10, 1992, this Court ordered the entry of a Final Judgement in favor of Defendants Jack N. Mogus and Charles Copeland, following the Court's September 6, 1991 Order dismissing, with prejudice, both Mogus and Copeland from this action.[1]

2. On or about February 19, 1992, Defendants William R. Tegtman, Noel Honohan and Alan C. Gibson filed a motion for their dismissal as defendants in this action, with prejudice, for the same reason that the Court dismissed Mogus and Copeland as defendants, i.e. that as individual members of the Eastern Airlines Pilot Retirement Board a/k./a. Pension Dispute Board, they were entitled to arbitral immunity. That motion is still pending before the Court.

3. On February 13, 1992, the Court, sua sponte, ordered that Plaintiff's First Amended Complaint (filed

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1 Defendants Mogus and Copeland are represented by their own counsel in this action sand have filed their own motion to strike Plaintiff's motion for summary judgement

January 25, 1992) be stricken, because it named defendants and asserted counts that the Court had previously dismissed with prejudice.

4. On or about March 3, 1992 Plaintiff filed a so-called Third Amended Complaint, (and a so-called Fourth Amended Complaint) which again included counts and named defendants which the Court previously dismissed with prejudice. In fact, Plaintiff's third and fourth amended complaints included the same counts contained in Plaintiff's January 25, 1992 amended complaint and named the same defendants which were previously dismissed with prejudice pursuant to the Court's Memorandum Opinion of September 6, 1992.

5. Accordingly, on March 10, 1992, Defendants filed a Motion to Strike Plaintiff's Third and Fourth Amended Complaints or in the alternative, for an Extension of Time to Respond to Plaintiff's Third or Fourth Amended Complaint. That motion is still pending before the Court.

Appendix 6

6. On or about June 25, 1992, Defendants filed a Notice of Pendency of the motions referred to above, notifying the Court that more than ninety (90) days had elapsed since these motions had been filed and that no hearing had been set on these motions.

7. Plaintiff's summary judgement motion seeks summary judgement against the Defendants on various counts of the third amended complaint which appear to basically allege that Plaintiff was wrongfully terminated in 1986 for failing to pay union dues and was wrongfully denied disability benefits in 1987.

8. Plaintiff's claim that he was wrongfully denied disability benefits in 1987 was the precise claim which this Court held was barred by the applicable statute of limitations in its September 6, 1992 Memorandum Opinion. Furthermore, Defendants note that Plaintiff unsuccessfully contested the legality of his 1986 discharge before this Court in Case No. 88-1114 (Spellman, J.), and Plaintiff's appeal to the Eleventh Circuit from that determination has been stayed (Eleventh Circuit

Case No. 89-5378), as a result of Eastern's chapter 11 bankruptcy filing.

9. In view of the above, Defendants respectfully submit that the Court should strike Plaintiff's motion for summary judgement or at the very least, rule upon Defendant's pending motions prior to requiring Defendants to respond to Plaintiff's frivolous motion for summary judgement.

WHEREFORE, Defendants respectfully request that the Court enter an Order striking Plaintiff's Motion for Summary Judgement, or alternatively, staying that motion until the Court rules on Defendant's Motion to Strike Plaintiff's Third and Fourth Amended Complaint or in the Alternative for Enlargement of Time Within Which to Respond to Plaintiff's Third or Fourth Amended Complaint and until the Court rules on the motion of Defendants Tegtman, Honohan and Gibson for their dismissal as defendants in this action.

Appendix 6

Respectfully submitted,

/s/_____

Maurice J. Baumgarten
Florida Bar No. 525324
Eastern Air Lines, Inc.
Building 16, Room 440, MIALG
Miami International Airport
Miami, Florida 33148
(305) 873-7857

Attorney for Defendants

Appendix 6

CERTIFICATE OF SERVICE

I, Maurice J. Baumgarten, attorney for the Defendants, hereby certify that a true and correct copy of the hereto annexed Defendant's Motion to Strike was served by U.S. mail this 19th day of April, 1993 to:

Daniel G. Gellert,
P. O. Box 320370
Cocoa Beach, Florida 32931

Robert T. Kofman, Esquire
Stearns, Weaver, et. al.
150 West Flagler Street
Miami, Florida 33130

Karen L. Morris, Esquire
Office of the General Counsel
Pension Benefit Guaranty Corporation
2020 K Street, N.W.
Washington, DC 30006-1860

Mark Hicks, Esquire
Hicks, Anderson & Blum, P.A.
New World Tower - Suite 2402
100 North Biscayne Blvd.
Miami, Florida 33132

/s/_____
Maurice J. Baumgarten

Appendix 7

Document No. 102

LETTER OF AGREEMENT
regarding
CONTRACT MAINTENANCE FEES
and
CHECK-OFF
between
EASTERN AIR LINES, INC.
and
THE AIR LINE PILOTS
in the service of
EASTERN AIR LINES, INC.
as represented by
THE AIR LINE PILOTS ASSOCIATION
INTERNATIONAL

THIS LETTER OF AGREEMENT is made and entered into in accordance with the provisions of the Railway Labor Act, as amended, by and between EASTERN AIR LINES, INC. (hereinafter known as "Eastern" or "the Company"), and the Air Line Pilots in the service of EASTERN AIR LINES, INC., as represented by the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL (hereinafter known as the "Association").

WITNESSETH:

It is mutually agreed:

I. CONTRACT MAINTENANCE FEE (CMF)

A. Contract Maintenance Fee Liability

1. Each pilot on the Eastern Pilots' Seniority list shall be required, as a condition of employment, beginning sixty (60) days after the effective date of this Letter of Agreement or sixty (60) days after the completion of his probationary period, whichever shall last occur, (1) to be or become a member of the Association, or (2) to pay

to the Association a monthly contract maintenance fee (CMF) for the administration of the Agreement and the representation of the pilot.

2. Such monthly CMF shall be equal to the Association's regular monthly dues which would be required to be paid by such pilot if a member; provided that neither membership nor the payment of a CMF shall be required in respect to any such pilot (a) to whom membership is not available upon the same terms and conditions generally applicable to any other member, or (b) as to whom membership was denied or terminated for any reason other than the termination for any reason other than the failure to tender periodic dues, initiation fees and assessments uniformly required by the Association or the EAL-MEC as a condition of acquiring or retaining membership. To the extent required by law, a rebate/reduction in his dues or CMF shall be made to any pilot properly requesting such rebate/reduction from the Treasurer of the Association. The Association shall treat members and non-members alike in calculating the amounts due, in establishing the due date of payments and in determining whether a pilot's account is delinquent

3. The provision of Section I of this Letter of Agreement shall not apply to those pilots who are occupying a management position with a title of director or above.

B. Delinquency

1. If any pilot who is required under this Letter of Agreement to make payment of a CMF becomes delinquent in the making of such payments, the Association shall notify such pilot by certified mail, return receipt requested, copy to the Vice President Flight Operations and System Chief Pilot of Eastern, or his successor or designee.

2. The letter of notification shall advise the pilot that he is delinquent in the payment of such CMF and the total amount of money due and the period for which he is delinquent and that he is subject to discharge as an employee of the Company. Such letter shall also notify the pilot that he must remit the required payment within a period of fifteen (15) days or be discharged.

3. The notice of delinquency required under this paragraph shall be deemed to be received by the pilot, whether or not it is personally received by him, when mailed by the Treasurer of the Association by certified mail, return receipt requested, postage prepaid to the pilot's last known address, or to any other address which has been designated by the pilot. It shall be the duty of every pilot covered by this Agreement to notify the Association's Membership Services Department of every change in his home address, or of an address where the notice required by this paragraph can be sent and received by the pilot if the pilot's home address is at any time unacceptable for this purpose.

C. Certification of Delinquency

If, upon the expiration of the fifteen (15) day period provided in Paragraph B above, the pilot still remains delinquent, the Association shall certify in writing to the Vice President Flight Operations and System Chief Pilot of Eastern, or his successor or designee, copy to the pilot; that the pilot has failed to remit payment within the grace period allowed and is therefore to be discharged. The Vice President Flight Operations and System Chief Pilot, or his successor or designee, shall thereupon take the proper steps to discharge such pilot from service of the Company as soon as possible, and in any event within thirty (30) days after receipt of the notice provided for herein, shall advise the pilot of his termination.

D. Appeal Procedure

1. A protest by a pilot who is to be discharged as a result of an interpretation or application of the provisions of this Section of this Letter of Agreement shall be subject to the following procedures:

2. A pilot who believes that the said provisions have not been properly interpreted or applied, as they pertain to him, may submit his request for review in writing fifteen (15) days after receipt of the notification from the Vice President Flight Operations and System Chief Pilot, or his successor or designee as provided in Paragraph C. The request must be sent by certified mail, return receipt requested, to the Vice President Flight Operations and System Chief Pilot, or his successor or designee, who will review the protest and render a decision in writing, not later than fifteen (15) days following receipt of the protest.

3. The Vice President Flight Operations and System Chief Pilot, or his successor or designee shall, forward his decision to the pilot, with a copy to the Treasurer of the Association, both by certified mail, return receipt requested. Said decision shall be final and binding on all interested parties, unless appealed as hereinafter provided. If the decision is not satisfactory to either the pilot or the Association, then either may appeal within fifteen (15) days from the receipt of the decision, by filing a notice of appeal. Such notice shall be sent to the other party and to the Vice President Flight Operations and System Chief Pilot, or his successor or designee, by certified mail, return receipt requested. Appeal shall be directly to a Neutral Referee who shall be agreed upon by the pilot and the Association within fifteen (15) days after receipt of the notice of appeal. In the event the parties fail to agree upon a Neutral Referee within the specified period, either the pilot or the Association may request the National Mediation Board to

name such Neutral Referee. The hearing before the Neutral Referee shall be held as soon as possible, and the decision of the Neutral Referee shall be requested within thirty (30) days after the hearing. The decision of the Neutral Referee shall be final and binding on all parties to the dispute. The fees and charges of such appeal and Neutral Referee shall be borne by the party making the appeal.

E. Status Pending Appeal

1. During the period a protest is being handled, as herein provided, and until a final decision is rendered by the Vice President Flight Operations and System Chief Pilot, or his successor or designee, or the Neutral Referee, the pilot shall not be discharged from the Company nor lose any seniority rights because of non-compliance with the terms and provisions herein. However, a pilot unavailable for normal flight duty by reason of non-compliance with the terms and provisions of this Letter of Agreement or by reason of exercising the above appeal rights shall have all monthly guarantees prorated in accordance with Section 11-C of the Agreement for each day of unavailability.

F. Discharge

A pilot discharged by the Company under the provisions herein shall be deemed to have been "discharged for cause."

II. DUES AND CONTRACT MAINTENANCE FEE CHECK-OFF

A. During the life of this Letter of Agreement, the Company will deduct from the monthly pay of each pilot which is subject to the withholding of federal taxes and remit to the Air Line Pilots Association membership dues uniformly levied (not including initiation fee, fines, penalties, or assessments) in accordance with Constitution and

Appendix 7

By-Laws of the Association as prescribed by the Railway Labor Act, as amended, or the contract maintenance fee as defined in Section I (A) above, provided such pilot voluntarily executes the following agreed-upon form which will be prepared and furnished by the Association and known as a "Check-Off Form".

ASSIGNMENT AND AUTHORIZATION FOR
VOLUNTARY CHECK-OFF OF
ASSOCIATION DUES
OR CONTRACT MAINTENANCE FEES

To Eastern Air Lines, Inc.

I, _____, hereby authorize and direct Eastern Air Lines, Inc. to deduct from my earnings 1.35% of my gross earnings as standard monthly membership Association dues (or such standard monthly membership dues as may hereafter be established by the Association), or an amount equivalent to such dues which shall be deemed a contract maintenance fee. Such amount so deducted is hereby assigned to the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL subject to all the terms and conditions of the Railway Labor Act, as amended, and the provisions of the Check-Off Agreement. This assignment and authorization may be revoked by me in writing at any time. A copy of any such revocation will be sent by me to the Chairman of the Master Executive Council.

Date_____
Signature of Employee_____
Address_____
Employee Number _____
Domicile_____

B. All Check-Off Forms will be submitted through

the President of the Association, who will forward the original signed copy addressed to the Director-Payroll Department of the Accounting Department, Eastern Air Lines, Inc., Miami, Florida, or to such other official as Eastern may from time to time designate. A properly executed Check-Off Form or notice of revocation received before the 15th of any month, will become effective the first of the month following such receipt by the Payroll Department of the Accounting Department, Eastern Air Lines., Miami, Florida. Illegible or improperly executed forms will be returned to the Chairman of the Master Executive Council of the Association.

C. Any notice of revocation, as set forth in the Check-Off Form, must be in writing, signed by the pilot and delivered by certified mail, addressed to the Director-Payroll Department of the Accounting Department, Eastern Air Lines, Inc., Miami, Florida, or to such other official as Eastern may from time to time designate, with a copy delivered in the same manner by the pilot to the Chairman of the Master Executive Council. Check-Off forms and notices of revocation received by Eastern will be stamp-dated on the date received by Eastern and will constitute notice to Eastern on the date received, not when mailed.

D. Deduction of membership dues or contract maintenance fees shall be made from each paycheck issued provided there is a sufficient balance due the pilot at that time after all other deductions authorized by the pilot or required by law have been satisfied. Within a reasonable time after the end of each month, Eastern will remit to the Association a check in payment of all dues and contract maintenance fees collected during that month pursuant to outstanding and unrevoked Check-Off Forms. These remittances will be subject to normal accounting practice with respect to adjustments necessary because of the methods involved in the deduction procedure.

E. A pilot who has executed a Check-Off Form and (1) who has been transferred or promoted to a position not covered by the Agreement, (2) who resigns from the Company, (3) who is furloughed or laid off or is (4) otherwise terminated from Eastern shall be deemed to have automatically revoked his assignment as of the date of such action, and if he (1) returns to a position covered by the Agreement (2) is rehired, or (3) recalled, further deductions of Association dues or contract maintenance fees will be made only upon execution and receipt of another Check-Off Form.

F. Collection of any back dues or contract maintenance fees owed at the time of starting deductions for any pilot, collection of dues or contract maintenance fees missed because the pilot's earnings were not sufficient to cover the payment of dues or contract maintenance fees in the specified pay period and collection of dues or contract maintenance fees missed because of accidental errors in the accounting procedure will be the responsibility of the Association and will not be the subject of payroll deductions, and Eastern shall not be responsible in any way because of missed collections. It will be the Association's responsibility to verify apparent errors with the individual Association member before contacting Eastern's Director-Payroll.

G. Changes in standard monthly membership dues or contract maintenance fees will be given effect only upon notice by the President of the Association, delivered in writing, to Eastern, by certified mail, and will become effective as provided in Section II (B) for check-off authorizations and revocations.

H. In cases where a deduction is made which duplicates a payment already made to the Association by a pilot and where a deduction is not in conformity with the provisions of the Association Constitution and By-Laws,

refunds to the pilot will be made by the Association.

III. GENERAL

A. The Association agrees to indemnify and hold Eastern harmless for any and all claims, awards, or judgement including court costs, back pay and attorney fees, which may result from action by any pilot or pilots or any other person by virtue of the wrongful application or misrepresentation of any of the terms of this letter of Agreement.

B. This Letter of Agreement supersedes and replaces Document No. 40, signed January 29, 1971.

C. This Letter of Agreement shall become effective as of the first of the month following signature by all parties and shall be subject to changes in the same manner as specified in the Basic Pilots' Employment Agreement between the parties hereto.

IN WITNESS WHEREOF, the parties have signed this Letter of Agreement this 28th day of February, 1985.

FOR EASTERN AIRLINES WITNESS:

/s/_____
Frank Borman
Chairman, President and
Chief Executive Officer

/s/_____
R. J. Shipner
Vice President Flight Operations
and System Chief Pilot

Appendix 7

FOR THE AIR LINE PILOTS
IN THE SERVICE OF
EASTERN AIR LINES, INC. WITNESS

/s/_____
Henry A. Duffy, President
Air Line Pilots Association,
international

/s/_____
L. D. Schulte, Chairman
Master Executive Council

Appendix 8

ASSIGNMENT AND AUTHORIZATION FOR VOLUNTARY CHECK-OFF OF ASSOCIATION DUES

TO: EASTERN AIR LINES, INC.

I, D. G. Gellert hereby authorize and direct Eastern Air Lines, Inc. to deduct from my earnings 1.35% of my gross earnings or standard monthly membership Association dues (or such standard monthly membership dues as may hereafter be established by the Association). Such amount so deducted is hereby assigned to the AIR LINES PILOTS ASSOCIATION, INTERNATIONAL subject to all the terms and conditions of the Railway Labor Act, as amended, and the provisions of the Dues Check-Off Agreement. This assignment and authorization may be revoked by me in writing after the expiration of one (1) year from the date hereof, or upon the termination date of the Pilots' Agreement in effect at the time this is signed whichever occurs sooner. A copy of any such revocation will be sent by me to the Chairman of the Master Executive Council.

Date: 12-1-71
Signature of Employee /s/ Daniel G. Gellert
Address: 610 Poinsetta Street - Satellite Beach, FL 32937
Man Number: 32839
Base Station: JFK - NY

Appendix 9

ASSIGNMENT AND AUTHORIZATION FOR VOLUNTARY CHECK-OFF OF ASSOCIATION DUES ~~OR CONTRACT MAINTENANCE FEES~~

To: Eastern Air Lines, Inc.

I, /s/ D. G. Gellert, hereby authorize and direct Eastern Air Lines, Inc. to deduct from my earnings 1.35% of my gross earnings as standard monthly membership association dues (or such standard monthly membership dues as may hereafter be established by the Association), ~~or an amount equivalent to such dues which shall be deemed a contract maintenance fee~~. Such amount so deducted is hereby assigned to the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL subject to all the terms and conditions of the Railway Labor Act, as amended, and the provisions of the Check-Off Agreement. This assignment and authorization may be revoked by me in writing at any time. A copy of any such revocation will be sent by me to the Chairman of the Master Executive Council.

DUES ONLY!
Date: June 1, 1985
Signature of Employee: /s/ D. G. Gellert
Address: P. O. Box 187, Cocoa Beach, FL 32931
Employee Number: 32938
Domicile: MIA

Attn: John Dodge

This authorization is for ALPA dues ONLY. NO Contract maintenance fee.

I hereby demand ALPA Membership and I do have dues deduction authorization on file (Init.)

Appendix 10

ASSIGNMENT AND AUTHORIZATION FOR VOLUNTARY CHECK-OFF OF ASSOCIATION DUES OR CONTRACT MAINTENANCE FEES

TO: EASTERN AIR LINES, INC.

I, /s/ D. G. Gellert, hereby authorize and direct Eastern Air Lines, Inc. to deduct from my earnings 2.35% of my gross earnings as standard monthly membership Association dues (or such standard monthly membership dues as may hereafter be established by the Association), or an amount equivalent to such dues which shall be deemed a contract maintenance fee. Such amount so deducted is hereby assigned to the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, subject to all the terms and conditions of the Railway labor Act, as amended and the provisions of the Check-Off Agreement. This assignment and authorization may be revoked by me in writing at any time. A copy of any such revocation will be sent by me to the Chairman of the Master Executive Council.

Signature of Employee /s/ D. G. Gellert
Address: P. O. Box 187 - Cocoa Beach, FL 32931
Employee Number: 32938
Domicile: MIA
Date: Sept. 17, 1985

Appendix 11

January 21, 1986

Captain D. G. Gellert
P. O. Box 370
Cocoa Beach, Florida 32931

Dear Captain Gellert:

Captain Jim Holder, Atlanta LEC Chairman, asked me to write you concerning your position on rejoining ALPA. Jim said you were based in Miami. I have forwarded your name to Ron Rindfleisch. He will send you the required paper work.

Sincerely,

AIR LINE PILOTS ASSOCIATION

/s/_____
Steve Holbert, Chairman
Membership Committee
Eastern Council 07

SH/nb
cc: Capt. Jim Holder
Capt. P. W. Page

AIR LINES PILOTS ASSOCIATION ATLANTA FIELD OFFICE
1007 Virginia Avenue, Suite B-200, Atlanta, GA 30354
(404) 763-3800

Appendix 12

January 23, 1986
P. O. Box 370, Cocoa Beach, FL 32931

Mr. John J. Magee
Treasurer, ALPA
P. O. Box 1169
Herndon, VA 22070

Dear Mr. Magee:

In this separate letter, since this does not concern every one copied in letter P 564 923 335, may I suggest that I pay the cost of my share in the contract between EAL and ALPA, until such a time as my ALPA membership is resolved in my favor.

In a January 9, 1986 letter from you, I am told that now I must pay another percent added to my contract obligation. You told me that CMF (Contract Maintenance Fee) now was unilaterally increased by one percent of my gross earnings.

I have made formal application for ALPA membership, and if I am not allowed membership, or until such time, I do not believe that I should pay monies to the general ALPA fund, those funds beyond your cost of negotiating and enforcing the contract and its immediate administration. Please send to me a bill, which represents those costs only, removing political, organizational, and all other cost that ALPA members are required to pay.

You can not have it both ways; you can not deny to me membership, and then demand payments in CMF which would be the same as if I was a member. At the present time, I do not agree with ALPA policy, and as such I should not be forced to pay these large sums of monies without my right to vote, dissent or otherwise express my views.

Your position is that I must pay these funds or be discharged, that I do not have any rights under the law, but that I must obey all your orders and directives or you can take my ability to earn a livelihood in my profession, is absurd. Please be guided accordingly.

Sincerely,

/s/_____
D. G. Gellert

Attached to P 564 923 335

Appendix 13

AIR LINE PILOTS ASSOCIATION
1625 Massachusetts Avenue, N.W.
Washington D.C. 20036
(202) 797-4000

April 14, 1986

Captain R. J. Shipner
Vice President Flight Operations
and System Chief Pilot
Eastern Airlines
Miami International Airport
Miami, Florida 33148

Dear Captain Shipner:

I am requesting that you rescind the discharge of D.G. Gellert, #32839, which has not yet become effective. He has today tendered a check in the amount of $1,248.36 to the Association in satisfaction of his contract maintenance obligation through April 1986. Thank you for your cooperation.

Sincerely,

/s/_____
John J. Magee, Treasurer
Air Line Pilots Assn.

cc: Mr. L. D. Schulte
Captain Paul Page
Mr. Martin Soll, Esq.
Mr. D. G. Gellert

Appendix 14

May 21, 1986

Mr. D. G. Gellert
P. O. Box 370
Cocoa Beach, Florida 32931

Dear Mr. Gellert:

The Appeal Procedure contained in Document 102 between Eastern Air Lines and the Air Line Pilots Association, International (ALPA), (copy enclosed) requires that the pilot and the Association agree upon a Neutral Referee. ·I have enclosed a list of Neutrals that are acceptable to the Association. In the event that we fail to agree upon a Neutral Referee, the pilot or the Association may petition the national Mediation Board to name a Neutral Referee. Under Document 102 the fees and charges of the appeal and neutral Referee are your responsibility since you filed an appeal.

Please advise the Association whether any of the proposed Neutrals are acceptable to you.

Sincerely,

/s/_____
Felice Busto, Attorney
Legal Department

FB: jd
Certified Mail

Airline Pilots Association
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(703) 689-2270

Appendix 15

Airline Pilots Association
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(703) 689-2270

July 23, 1986

Mr. D. G. Gellert
P. O. Box 370
Cocoa Beach, Florida 32931

Dear Mr. Gellert:

I am writing to advise you that the Association has requested Lawrence E. Seibel to arbitrate your discharge from Eastern Airlines under Document 102. This was done pursuant to your telephone request on July 18, 1986, during which you selected Mr. Seibel to hear your case.

The Association, through John Loomos, will represent you at the arbitration. Under Document 102 the costs of the arbitration are your responsibility since you filed an appeal in this matter.

Please feel free to contact me should you have any questions.

Sincerely,

Felice Busto, Attorney
Legal Department

Appendix 15

FB: bjb

Certified

cc: M.E. Burke
C. Copeland
A.C. Gibson
G.T. Jehn
J. Loomos
J.J. Magee
L.D. Schulte
C. Sheppard
M.A. Soll

Appendix 16

LAURENCE E. SIEBEL
Impartial Labor Arbitrator
5523 Uppingham Street
Chevy Chase, Maryland 20815
(301) 656-9500

October 17, 1986

Felice Busto, Esq., Attorney
Legal Department
Airline Pilots Association International
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036

John Loomos, Esq.
Airline Pilots Association, EAL-MEC Office
201 Madeira Avenue
Coral Gables, Florida 33134

Re: Captain D. G. Gellert
Eastern Airlines, Inc.
Contract Maintenance Fee
CMF Case No. 2

Dear Ms. Busto and Mr. Loomis:

There are enclosed herewith two executed Decisions in the above styled matter.

The fee for my services is $2,000.00, which includes the hearing, travel, and study, a total of four (4) days. The expenses were $250.00; which included travel, etc. The total of the fee and expenses, therefore is $2,250.00 which, I assume, is payable one-half or $1,125.00 by each of the Parties or is payable by the Airline Pilots Association. I leave that to you and to Mr. Soll for resolution.

Sincerely yours,
/s/_____
Laurence E. Seibel

Copy to:
Martin A. Soll, Esq.
Manager/Flight Agreements and Contract Administration
Eastern Airlines/Flight Operations
Miami International Airport
Miami, Florida 33148

Appendix 17

Airline Pilots Association
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(703) 689-2270

April 6, 1989

Mr. Daniel G. Gellert
Post Office Box 320370
Cocoa Beach, Florida 32931

Dear Mr. Gellert:

If Eastern is, as your March 27 letter suggests, threatening you with loss of retirement benefits unless you work during the current IAM strike and ALPA sympathy strike, this would, of course, be unlawful. If necessary, ALPA can recommend competent counsel to assist you should such threats materialize, and you may feel free, despite your non-membership status, to call the ALPA Legal Department for such a recommendation if needed.

If you believe that ALPA has kept any sums of money which are properly yours, please contact our Membership Services Department for an accounting.

Sincerely,

/s/_____
Henry A. Duffy, President

HAD: jd

cc: J. J. Davis

Appendix 18

PENSION BENEFIT GUARANTY CORPORATION
2020 K. Street N.W. - Washington, DC 20006-1860

March 25, 1991

Memorandum

To: Anna L. Gilreath
Eastern Plans Project Coordinator

Through: David C. Lindeman, Director
Corporate Policy and Research Department

From: Ellan H. Spring
Program Policy Division, CPRD

Re: Pilots' Disability Benefit

You have asked whether the disability benefit in the Eastern Air Lines Fixed Benefit Retirement Income Plan for Pilots is a guaranteeable benefit.

The pilots' plan provides that a participant will be eligible to receive a disability benefit if he becomes disabled prior to attaining normal retirement age. permanent disability is defined in section 3.6(b) of the plan as follows:

> Permanent disability means the complete inability of such Participant as a result of physical or mental reasons to continue in employment with Eastern as a pilot . . .

Disability resulting from intentionally self-inflicted injuries, suicide attempts, substances abuse or acts of war while a pilot is on military leave are excluded.

The PBGC's regulation or guaranteed benefits provides that an annuity payable under the terms of a plan for a total and permanent disability that started before termination is a pension benefit and therefore guaranteeable unless the PBGC determines that the standards for determining total and permanent disability under a plan are unreasonable or were modified in anticipation of termination. If the PBGC makes either determination, it will guarantee a disability benefit only if the participant meets the standards set by the Social Security Administration for determining total disability. 29 C.F.R. Par. 2613.7 (a) and (b).

The question raised with regard to the pilots plan is whether the plan's disability standard is a reasonable standard of total and permanent disability.

At issue is whether an "occupational" disability standard, which only requires the participant be unable to perform the duties of his or her particular job (and, sometimes, "similar" jobs), is "reasonable", or whether the plan disability standard must be of the more restrictive type used by Social Security (i.e., one that defines disability as inability to engage in any substantial gainful activity) to be considered "reasonable" and thus guaranteeable.

The preambles to the proposed and final guaranteed benefits regulations shed no light on this questions. However, we believe that, if we had intended to guarantee only disability under the Social Security type standard, the regulation would have so provided. Further, occupational-disability standards are not uncommon; indeed, the Civil Service Retirement Systems uses such a standard. A plan that utilizes an occupational-disability standard would be funding to reflect the higher incidence of disability retirements under such a standard.

Appendix 18

Conclusion

We conclude that an occupational disability standard is perfectly acceptable as a standard for total and permanent disability. If the standard contained in a plan is reasonable similar to either the Social Security disability standard or is a typical occupational-disability standard, as the pilots' standard is, disability benefits for disabilities occurring before termination should be guaranteed. PBGC's reservation of authority under Par. 2613.7(b) is intended to allow us to not guarantee disability benefits where the plan standards are unreasonable, where plan disability standards are not reasonably administered, or where the standards were modified in anticipation of plan termination.

We have discussed this issue informally with Renae Hubbard of OGC, but have not sought that Office's formal legal opinion.

cc: Renae Hubbard

Appendix 19

May 7, 1992

To File
Larry L. Norfolk
Member, Appeals Board

Appeal 91-410, Daniel Gellert
Eastern Air Lines

The following is a record of my telephone conversation on May 7, 1992, with Bill Roberts, an attorney with the Airline Pilots Association ("ALPA"). He is very familiar with the agreement, and specifically with Eastern Air Lines, (EAL), because he worked on EAL matters for quite a few years at ALPA.

He stated that ALPA had worked with PBGC on a number of EAL disability cases in which EAL refused to pay out sick leave because workers were on strike, and thus would not let them go out on disability because they had not exhausted sick leave as required by the pension plan. he said these pilots were in limbo when the plan terminated, i.e. they were in a "Catch 22" situation. A number of grievances and lawsuits were filed against EAL because they were not reducing the sick leave of pilots and denying their disability applications. ALPA worked with the PBGC to resolve the outstanding disability cases after the plan terminated.

However, this would not apply to some one who terminated prior to the strike period. Specifically, someone who terminated employment in 1986 would not have been a part of the discussions with PBGC concerning exhaustion of sick leave.

We discussed the meaning of the provisions of Section 38 of the EAL/ALPA agreement dated 1981. He agreed

that Section 38, D. 1. meant that I could divide the number of days of sick leave by 15 and determine how many months it would take to exhaust sick leave. We discussed E.2. as it applied to pilots who were drawing workmen's compensation. He said he had not had any issues come up with regard to this section, but would agree with my assessment that it would seem that such a pilot would be charged consecutive calendar days for sick leave instead of the maximum of 15 days per month as described above.

For future reference, his telephone number at ALPA is 703-689-2270, extension 4099.

Appendix 20

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
-V-
EASTERN AIRLINES, INC. Deft #1

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

CASE NUMBER: CR 90-629

(Name of Defendant)

JANE PARVER
425 Park Avenue
New York, N.Y. 10022

Defendant's Attorney and Address

THE DEFENDANT:
☒ pleaded guilty to count(s) #1, #7, #16, #17, #22, #25 and #36.
☐ was found guilty on count(s)_____
after a plea of not guilty.

Accordingly, the defendant is ADJUDGED guilty of such count(s), which involve th following offenses:

TITLE & SECTION	NATURE & OFFENSE	COUNT NUMBER(S)
Title 18, U.S.C. Sections 371 and 3551 et seq.) Title 18, U.S.C. Sections 1001, 3551 et seq. and 2).	Conspiracy to defraud the FAA and falsified documents.	1, 7, 16, 17, 22, 25 and 36.

The defendant is sentenced as provided in pages 1 through 2 of this Judgment The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)_____ and is discharged as to such count(s).
☒ ~~XXXXXXX~~) Open counts (is)(are) dismissed on the motion of t United States.
☒ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☐ It is ordered that the defendant shall pay to the United States a specia assessment of $_____ which shall be due immediately.

It is further ORDERED that the defendant shall notify the United States Attor for this district within 30 days of any change of residence or mailing addres until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

EASTERN AIR LINES, INC.
Defendant's mailing address:

Miami International Airport

Miami, Florida 33148
Defendant's residence address:

March 20, 1991
Date of Imposition of Sentence

L. Leo Glasser
Signature of Judicial Officer

I. LEO GLASSER U.S.D.J.
Name & Title of Judicial Officer

March 20, 1991
DATE:

A TRUE COPY ATTEST
DATED Mar. 20 1991
ROBERT C. HEINEMANN
CLERK
BY: Denise Dekillot
DEPUTY CLERK